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A TREATISE
ON THE LAW OF THE
CONTRACT OF PLEDGE

AS GOVERNED BY BOTH THE
Common Law and the Civil Law.

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PREFACE.

I would not have thought of writing at this late day a book on the Contract of Pledge of the Common Law exclusively. Several treatises have already been published on that subject. Text-books, besides, are too often mere repetitions of one another. My object in this work is to arrive at a better knowledge and understanding of the law of Pledge of the Common Law by comparing it with the law of Pledge of the Civil Law, from which it descends. The comparative study of scientific subjects is always profitable, whether it is that of comparative anatomy or that of comparative jurisprudence. Both Judge Story and Mr. Schouler in their Treatises on Pledges recognized the relative obscurity and uncertainty of the Common Law on that subject, and suggested that assistance could be derived for its better understanding from the knowledge of the Civil Law. This is my reason, and, if necessary, my excuse, for presenting this book to the consideration of the Bench and Bar of this country.

HENRY DENIS.

TABLE OF CONTENTS.

CHAPTER I.

	PAGES.
Introduction. Real and personal securities. Contract of pledge known to the Mosaic Law. Origin of the word <i>pledge</i> . <i>Pignus</i> of the Roman Law. Growing importance of personal property. Hence the great importance of the pledge in modern times. It is the pivot of commerce. Difference between the chattel mortgage and pledge. Confusion in Common law in this respect. No confusion in the Civil law. Equitable liens of the Common law have encroached upon the law of pledge and caused a departure from its fundamental principles	1-21

CHAPTER II.

Nature and subject matter of the pledge. What things may be pledged. Possession of the pledge by pledgee is indispensable. Therefore what can not be delivered to him can not be pledged. A thing may be sold which can not be pledged. Incorporeal things could not be pledged under the Roman. They may be under modern Civil law and under the Common law. Transfer of incorporeal things, when a sale and when a pledge. Notice to debtor of claims indispensable in the Civil law. Not necessary in the Common law. Real rights in the Civil law may be immovable or movable. Only the latter can be pledged	23-36
---	-------

CHAPTER III.

Things in expectancy or which have a mere potential existence can not be pledged because possession can not be given to the pledgee. Error of Judge Story on this subject in respect to the Civil law. Difference between the pledge and the mortgage of the Roman law as shown by Domat. Also by Troplong. <i>Fiducia</i> of the Roman law	38-45
---	-------

CHAPTER IV.

Can rights of inheritance be pledged? In the Civil law, rights of inheritance can not be the subject of a contract by the	
---	--

	PAGES.
heir while the ancestor is alive. The prohibition is founded on reasons of morality and public order. Not so in the Common law. There, the sole question is the sufficiency of interest in the heir to form the consideration of a contract. In the Civil law, the rights of inheritance after the death of the ancestor may be pledged by the heir if the estate is composed of personal property. A lease of real estate may be pledged. A patent of invention may be pledged. Works of the mind may be pledged	47-61

CHAPTER V.

A pledge may be given to secure the fulfilment of any obligation, besides the payment of money. It may be given also to secure the debt of another person than the pledgeor. In that case the pledgeor is not personally bound. <i>Res non personæ debet</i> . The pledge being an accessory contract falls with the principal. <i>Accessorium sequitur principale</i> . In case of the pledge securing an immoral agreement, the pledgeor has no right of action to recover the thing pledged	63-77
--	-------

CHAPTER VI.

Forms and essentials of the pledge. At Common law the contract may be verbal. In the Civil law, except in commercial transactions, the pledge must be evidenced by an act or deed in writing, stating the amount of the debt and describing the thing pledged. Delivery to the pledgee is indispensable. He must receive and retain possession. And his possession must be ostensible and free from doubt or ambiguity	79-90
--	-------

CHAPTER VII.

Pledge in form of a sale. Valid both in the Common and Civil law, if it contains all the requirements of the pledge.	91-100
---	--------

CHAPTER VIII.

Contracts of security which are neither pledges nor mortgages. Pignorative transactions in which the debtor makes a simulated sale of his property to secure the creditor. In the absence of fraud or injury to third persons these contracts have been held valid. But they create no right of preference in favor of the creditor	101-107
---	---------

CHAPTER IX.

PAGES.

Delivery and possession of the pledge. Any ambiguity in the character of the pledgee's possession may invalidate the pledge. Several instances of pledges set aside by the courts for that reason. Possession of the pledge may be given to a third person for account of the pledgee. The pledgeor himself may in some cases be the detainer <i>ad hoc</i> for the benefit of the pledgee	109-120
--	---------

CHAPTER X.

Possession by the pledgee is indispensable for the validity of the pledge, but the possession may precede or follow the contract. When it follows it, the pledge attaches from that moment. Roman law on that point. Substitution of the thing pledged valid. Delivery and possession of the pledge may be symbolical or fictitious. Possession of goods in a store valid by delivery of the keys of the store. This doctrine criticised by some writers. Possession of goods by delivery of bill of lading. Possession of things too bulky to be delivered corporeally valid by signs of possession	121-132
--	---------

CHAPTER XI.

Possession of incorporeal things. Difference between the Common law and the Civil law. In the former mere delivery of title to creditor sufficient. In the latter, notice of the transfer of title must be given to the debtor of the credit or claim. Rights or claims which are not evidenced by title can not be the subject of a pledge. Discussion of this point between French writers. Sale of rights which are not evidenced by title valid as such. But can such sale validly cover the contract of pledge? Common law and Civil law authorities	133-148
---	---------

CHAPTER XII.

The possession of the pledgee being *precarious*, as he does not possess as owner, he can never, under the Civil law, acquire the ownership of the pledge by occupation or *usucapio* through the longest prescription. Nor can the pledgeor ever obtain the release of the debt by the *prescriptio liberandi causa*, as long as the pledge remains in the hands of the pledgee, because this is a continuous acknowledgment of the obligation which suspends the course of

	PAGES.
prescription. Interesting discussion of French writers on this point, when the character of the possession has changed by payment of the debt, the pledge being still left in the hands of the pledgee	149-154

CHAPTER XIII.

Under the Common law, the pledgeor is debarred by no length of time from the right of demanding the return of the pledge on payment of the debt. And the pledgee never acquires the ownership of the thing pledged except by foreclosure of the pledge. Yet, in direct contradiction of the principle, some writers, and among them Judge Story, say that after a long lapse of time, if the pledgeor makes no claim for redemption, the right will be presumed to be extinguished, and the pledge will remain absolutely the property of the pledgee. Under the Civil law, prescription is based upon the presumption of payment, and therefore when the debt is prescribed the pledge lapses. Under the Common law, it is only the right of action which is barred by limitation, and the debt remains alive after the right to sue is barred	155-164
---	---------

CHAPTER XIV.

Rights and obligations of the pledgee. The act in writing, which, under the Civil law, is necessary in the contract of pledge, is only intended to protect third persons. Between the parties themselves the pledge is valid without the writing. The thing pledged is in the hands of the pledgee on deposit. He has therefore no right to use it, under the rules of the Civil law. In the words of the Roman law, <i>Si creditor pignore utatur furtum committit</i> . Case of the banker Mirès condemned to imprisonment by the French Courts for wrongfully disposing of the securities pledged to him. Exceptions to the rule that the pledgee has no right to use the pledge	165-176
---	---------

CHAPTER XV.

Subpledge or Repledge by Pledgee. On principle, to subpledge or repledge is to make use of the pledge, and therefore it is violative of the contract. Troplong favors the repledging of goods in commercial transactions. When a bank repledges the collaterals in localities where it is customary to do it, the pledgeor is presumed to have tacitly	
--	--

TABLE OF CONTENTS.

ix

	PAGES.
consented to it. The custom in such cases enters into the contract. The Roman law allowed the pledgee to sub-pledge to his own creditor	177-182

CHAPTER XVI.

Right of the pledgee to use the pledge under the common law. The law writers say that the pledgee may use the pledge if it is not damaged thereby. Source of the common law jurisprudence on this point. Lord Holt held that the pledgee could use the pledge <i>at his own peril</i> . The ruling repeated by Sir William Jones and Justice Buller. Condemnation of this reasoning by Judge Story. Preponderance of authorities in the United States that the pledgee may subpledge the collaterals to secure his own debt	183-189
---	---------

CHAPTER XVII.

Tortious pledge of another person's property. In the fraudulent pledge of negotiable paper by an agent of the owner, if the pledgee is in good faith and without notice of adverse rights, the defrauded owner has no recourse against the pledgee. For the pledge of other property than negotiable paper, the law of England, the United States and Louisiana protects the true owner against the pledgee in good faith, under the rule that nobody can transfer a right which he himself does not own. But in France and other continental countries in Europe, which followed its legislation, the possession of movable or personal property is equivalent to title, and, therefore, the pledgee in good faith is protected against the true owner of property pledged by an unauthorized pledgeor	191-195
---	---------

CHAPTER XVIII.

Right of pledgeor to demand the return of the pledge on account of unauthorized use of the same: the rule is based upon the principles of the law of contract. English decisions opposed to it. Even when the pledgee has made an improper and wrongful use of the pledge, the pledgeor is relegated to an action for damages under the authority of the English cases. This is a clear departure from the principles of the contract of pledge	197-206
---	---------

CHAPTER XIX.

Right of other creditors of the pledgeor to seize the pledge. In the Civil law the right of retention of the pledge spring-	
---	--

ing from the law and the contract, only affects the pledgeor. Against him the pledgee may retain the pledge until it is foreclosed. But neither the law nor the contract prevent third persons from seizing the pledge in the hands of the pledgee, if the value of the thing pledged exceeds the debt, and the rights of preference of the pledgee may be protected in the seizure and sale of the pledge.

At Common law the other creditors of the pledgeor can not seize or attach the pledge as long as it is unforeclosed in the hands of the pledgee. The right of retention of the latter is absolute. In some States of the Union the Common law has been amended by statute and the pledge may be attached in those States, subject to the lien of the pledgee.

The pledgee is not bound to surrender the pledge to the assignee of the pledgeor. Jurisprudence of the Supreme Court of the United States; Jurisprudence of Louisiana. . . . 207-211

CHAPTER XX.

The pledgee must take proper care of the pledge. He is not responsible for the *light fault*. His care must be the same that he would take of his own property. He is entitled to the expenses incurred in preserving the pledge and has a lien for those expenses.

In the Civil law the pledgee has the right to demand a new pledge if the first is insufficient, or the immediate payment of the debt, even if the latter is not yet due. Not so in the Common law; there, the pledgee can only demand the rescission of the contract, and damages if he suffers any. . . . 223-234

CHAPTER XXI.

The power of attorney to sell the pledge is not revoked by the bankruptcy or death of the pledgeor. Doctrine of the power of attorney, coupled with an interest of the Common law. *Procurator in rem suam*, of the Civil law. What interest, with which the power of attorney is coupled, will prevent the revocation. The interest must be in the *subject* itself. Case of Hunt vs. Rousmanier's Administrators. Authority of Chief Justice Marshall. In the Civil law the rule is absolute. No distinction is made between the interest in the subject and the interest in the proceeds. . . . 235-243

CHAPTER XXII.

	PAGES.
The pledge is indivisible. Every portion of the thing pledged secures every part of the debt. The principle is of the nature of the contract of pledge, but not of its essence. The parties may, by agreement, render the pledge divisible. The consequence of the indivisibility of pledge is that, in case of death of the pledgeor, if one of his heirs pay his share of the debt, he can not demand the release of the pledge for the amount paid	245-246

CHAPTER XXIII.

What debt is secured by the pledge. In default of an agreement to the contrary. The pledge only secures the debt for which it is given. The retention of the pledge by the pledgee after payment of the debt is wrongful and entitles the pledgeor to an action for damages. In France and other countries of the Civil law, the pledge secures, in default of an agreement to the contrary, the other debts of the pledgeor to the pledgee, provided they are contracted posteriorly to the pledge and are due before the debt originally pledged. Roman law on this point.....	247-251
--	---------

CHAPTER XXIV.

The pledgee can not <i>by previous agreement</i> appropriate the pledge to himself, in default of payment. Both the Common and the Civil law forbid it. The <i>Lex Commissoria</i> of the Roman law. Intended to protect the debtor against the greed of the creditor. But, <i>after the debt has become due</i> , the debtor can transfer the thing pledged to the creditor in payment	253-260
---	---------

CHAPTER XXV.

Right of the pledgee to have the pledge sold. By agreement, the pledge may be sold without the intervention of the courts, at private sale, by the pledgee himself, on the terms and conditions fixed in the contract. Error of Mr. Jones and Mr. Edwards in regard to the sale of the pledge in Louisiana.....	261-265
---	---------

CHAPTER XXVI.

Right of the pledgee to buy the pledge. The parties may agree that in default of payment, the pledgee will have the right to cause the thing pledged to be sold at public or	
--	--

	PAGES.
private sale, with or without notice, through an agent, or by the pledgee himself, and that he may himself buy it. All such agreements are valid and are now in daily practice....	267-269

CHAPTER XXVII.

Commercial Pledges. Even under the Civil law, the written act or deed of pledge is not necessary in commercial pledges. Delivery of negotiable paper payable to bearer, or endorsed if payable to endorser, constitutes the pledge of it. The pledgee of negotiable paper without notice is a holder for value. Even the pledge of such paper by a factor without authority is valid. The law merchant prevails in such cases	271-282
---	---------

CHAPTER XXVIII.

Commercial pledges under the law of France and other countries of the Civil law. No writing necessary. No foreclosure of the pledge other than the sale of the thing after eight days to the debtor. Article of the Code of Commerce of the German Empire protects the pledgee in good faith even against the true owner. The Code of Commerce of the Netherlands does the same thing	283-289
---	---------

CHAPTER XXIX.

Pledges of bills of lading. It is more properly the merchandise which is pledged by the bill of lading. Possession of the goods is given to the pledgee by transfer of the bill of lading. The common carrier holds the goods for account of whomever is the transferee of the bill of lading. His possession is that of such transferee. Yet the latter is only the <i>apparent</i> owner of the goods when he is a pledgee. Erroneous expressions of certain decisions of the Supreme Court of the United States which speak of the <i>ownership</i> of the pledgee of bills of lading. Bills of lading in this country, except in the State of Maryland, are only <i>quasi</i> -negotiable instruments. The assignee of them has only the rights which the assignor had. Attempts in some States to make bills of lading fully negotiable nullified by the courts.	291-313
--	---------

CHAPTER XXX.

Bills of Lading under the Civil law. In France and the countries of Europe which followed her legislation, the holder	
---	--

	PAGES.
in good faith of a bill of lading is entitled to the goods against the true owner, even if the bill of lading has been fraudulently transferred. The bill of lading has, therefore, in those countries the elements of full negotiability. The principle was first based upon the necessities of commerce, and was recognized and enforced in the early days of Italian jurisprudence. Casaregis and Deluca	315-319

CHAPTER XXXI.

A bill of lading is at the same time a receipt for the goods and a contract to carry them. The contract is entered into at the place where the bill is drawn, and it is executed at the place where the goods are delivered. When the <i>lex loci contractus</i> is not the same as the <i>lex loci solutionis</i> , which is to govern in cases of bills of lading? Doctrine of the <i>lex loci solutionis</i> under both the Common law and Civil authorities	321-337
---	---------

CHAPTER XXXII.

Pledge of warehouse receipts. Like the bill of lading the warehouse receipt is a muniment of title. The holder of it is entitled to the possession of the goods, and the warehouseman holds them vicariously for him. The two subjects are to some extent governed by the same principles. Warehouse receipts are also <i>quasi</i> -negotiable. The pledge of the receipt is the pledge of the goods. The assignee or transferee of it has the same rights that the assignor or transferor had. Such is the law in the United States, except in the State of Maryland, where the <i>bona fide</i> holder of a warehouse receipt is protected against the true owner, even if the receipt was fraudulently transferred. Law of Louisiana. Law of New York. <i>Indicia</i> of ownership	339-359
--	---------

CHAPTER XXXIII.

Law of France for warehouse receipts	361-363
--	---------

CHAPTER XXXIV.

Pledge of corporate stock. Both under the Common law and the Civil law corporate stock may be pledged. It was a subject of doubt for a long time whether that kind of property could legally be pledged. Is the mere delivery of the certificate of shares sufficient to constitute a pledge of the stock? It is so in Louisiana by statute. It seems to be the	
---	--

	PAGES.
general opinion that in the other States there must be a written transfer of the stock to the pledgee. The transferee, in such case, if the transfer is made on the books of the corporation, is liable in the same manner as a stockholder. Such is the case with pledgees of stock of the national banks. Recent decisions of the Supreme Court of the United States showing how such liability may be avoided by pledgees	365-379

CHAPTER XXXV.

Pledgee of corporate stock entitled to the dividends, but he must account for them; they reduce the debt <i>pro tanto</i> . Pledgee of stocks not obliged to return the same specific shares; he may deliver to the pledgeor instead, stocks of the same kind and value. Such is the jurisprudence in this country and in England. It is clearly a departure from the true principles of the contract of pledge. The agreement between the parties that the pledgee may return something equivalent to the pledge, but not the specific thing pledged, is valid according to the Civilians, but the contract in that case is not that of the pledge properly speaking.....	381-387
--	---------

CHAPTER XXXVI.

Pledges of policies of insurance. A policy of insurance being a chose in action may be pledged at Common law by mere delivery to the pledgee; but only so when it is payable to the person named in the policy. Under the Civil law, as the pledge must be evidenced by an act in writing, stating the amount of the debt secured, is the simple endorsement and delivery sufficient? The pledge by transfer of the policy is not binding on the insurer; but, in such case, it is the transfer which is not valid without the consent of the insurer, not the pledge	389-395
---	---------

CHAPTER XXXVII.

Pledge of policies of insurance to a person who has no interest in the life of the insured. Early days of life insurance. The principle is settled that no policy can originally issue to a person who has no interest in the life of the insured. But after being validly issued to one having the required interest, can it be transferred to one having no interest? The United States Supreme Court has decided that such transfer is invalid. The jurisprudence of the State of New	
--	--

TABLE OF CONTENTS.

XV

York is otherwise. The principle underlying this question is whether the life insurance is a contract of indemnity, or a mere contract to pay a sum of money in consideration of the premiums, at the death of the insured. Jurisprudence of England settled in the latter sense. Recognition of the same doctrine in France	PAGES. 397-408
--	-------------------

CHAPTER XXXVIII.

Under the rule established by the Supreme Court of the United States, that the pledgee of a policy of life insurance has an interest in the life of the insured only to the extent of his debt, he is obliged to return to the pledgeor the excess of insurance money recovered under the policy. But when the creditor himself has insured the life of his debtor, for his own account, and has paid the premiums out of his own funds, is he entitled to the whole amount of the policy if it exceeds the debt? Decided in the affirmative in France ..	409-411
---	---------

CHAPTER XXXIX.

Pledge of Margins. The Common law jurisprudence has established the rule that when a broker purchases stocks or goods for account of a customer, who deposits a margin with him, as security, the contract of pledge takes place tacitly between them. The margin deposited constitutes the pledge, as well as the shares of stock and the goods, if the same are delivered by the seller to the broker. The implication of the understanding of the contracting parties arises from the custom of the locality. The Court of New York has been prominent in establishing this jurisprudence	413-422
--	---------

CHAPTER XL.

The doctrine of the implied contract of pledge between the broker and his customer in the purchase of stocks or goods which the former <i>carries</i> for the latter, was adopted by the court of Connecticut and carried farther than it was by the court of New York. In the Connecticut cases it was held that the broker was not under any obligation of keeping the identical stocks purchased for the customer, and that, provided he was ready to deliver stocks of the same kind to the customer at the redemption of the pledge, his duties as pledgee were not violated. The court of Massachusetts refused to recognize this doctrine....	423-431
--	---------

CHAPTER XLI.

PAGES.

Pledges by factors. At Common law the rule is that a factor to whom property is consigned for sale has no authority to pledge it. In the early part of the present century, the rule was changed in England by statute. The necessities of commerce demanded it. English Factors' Acts. The State of New York soon followed the example of England, and in 1830, its Factor's Act was passed. This law did not afford complete security to the pledgee. The State of Massachusetts took a more decided position on this subject by its legislation. Efforts of the Legislature in Louisiana to protect the pledgee in transactions with factors	433-447
---	---------

CHAPTER XLII.

In the Civil law no distinction is made in pledges of factors, depositories, common carriers, or other possessions of personal or movable property generally. Such was the rule of the old commercial law in some countries of Europe during the middle ages. Casaregis and Cardinal Deluca quoted. Troplong on the same subject. French Code of Commerce. Tendency of the Common law to protect the true owner against the pledgee in good faith. Opposite doctrine of the Civil law, to protect the pledgee in good faith against the true owner. Pledge by factors of negotiable paper valid against the owner. <i>Indicia</i> of ownership.	449-464
--	---------

CHAPTER XLIII.

Liens at Common law and Tacit pledges of the Civil law. Similarity of the two subjects. In both cases the right of preference and priority of the creditor rests upon possession. The denomination of tacit pledge hardly a correct one. The pledge is necessarily contractual. <i>Privilegia</i> of the Roman law. Explanation of <i>statutory</i> pledge. Lien at law and tacit pledge of the lessor, the artisan, the inn-keeper, the common carrier, etc. The lien resulting from judicial seizure. <i>Pignus coactivum</i> of the Roman law	465-477
--	---------

CHAPTER XLIV.

Lien from seizure under the Common law. Difference between the Civil and the Common in respect to notice of seizure to debtor of the credit seizure. Such notice indispensable in the Civil law to create the lien. In the Com-	
---	--

	PAGES.
mon law the lien arises from the seizure independently of the notice. Origin of the word lien. Right of retention of the lessee's property for the rent. Distress at Common law. Exemptions from seizure for rent	479-490

CHAPTER XLV.

Equitable liens of the Common law. Privileges of the Civil law. Similarity of the two subjects. In both cases the creditor has a right of preference and priority over the proceeds of the property; but in neither case is he put in possession of it. The equitable lien is derived from the <i>hypotheca</i> of the Romans. The <i>pignus</i> and the <i>fiducia</i> . In both of these contracts of security the creditor was in possession of the property, and the debtor suffered in consequence from the deprivation of it and the neglect or mismanagement of it by the creditor. This was remedied by the <i>hypotheca</i> . Nature of the equitable liens. Recent decisions of the Supreme Court of the United States.....	491-502
---	---------

CHAPTER XLVI.

Continuation of the subject of Equitable Liens. Professor Pomroy. <i>Privilegia</i> of the Roman law. Domat. Code Napoleon and Civil Code of Louisiana provide for Privileges; they are of strict law and interpretation. Decisions in Louisiana. Difficulties of the vital question in that State when equitable liens are claimed in the Federal courts. Can they be recognized and enforced within the territory of a State of which the municipal law forbids them? The Supreme Court of the United States, and the Court of Appeals abstained from deciding the question.....	503-517
--	---------

CHAPTER XLVII.

Although the doctrine of Equity is not systematized in Louisiana as it is in England and in the States of the Common law, yet it is recognized and applied in that State. Its peculiar admixture of law and equity has been well stated and explained by Mr. Hennen in his Digest. Remarks of Merlin and of Chief Justice Hale on Equity	519-527
--	---------

LIST OF AUTHORS CITED.

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 taries.
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 Pont, Des Privilèges.
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 Pothier, Des Obligations.
 Pothier, Pandectes.
 Pothier, De la Possession.
 Pothier, Du Louage.
 Pothier, De la Vente.
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 Troplong, Du Cautionnement.
 Troplong, Du Nantissement.
 Troplong De la Prescription.
 Troplong, De la Privilèges.
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TABLE OF CASES CITED.

A

	PAGE		PAGE
Abbott vs. Goodwin	120	Am. D. & T. Co., Hanover Bank	
Adams vs. Bowerman	461	vs.	341
Adams, Joy vs.	158	Anderson, Thibodaux vs.	99
Adams vs. Sturges	248	Anderson vs. Warehouse Co.	372
Adams, Vermilye vs.	195, 280	Andrews vs. Pond	321
Agnew vs. Johnson	195	Antoine vs. Smith	71
Albert, Matthews vs.	373	Argote's Succession	55
Allen, Bush & West vs. Nettles.		Arick vs. Walsh	488
	243, 237, 97	Armstrong, Cammack vs.	401
Allen, Mutual Company vs.	405	Arnold vs. Brown	479
Allen vs. Smith	120	Association Co., City Bank vs.	390
Allen vs. St. Louis Bank		Auje vs. Variol.	210
	436, 437, 439, 446	Austin, Howe vs.	99
Am. D. & T. Co., Corn Exchange		Ayres & Reed Co. vs. Dorsey Co.	300
Bank vs.	341		

B

Bagley vs. Sheriff	246	Bank vs. Laird	246
Bain vs. Brown	268	Bank, Latham vs	390
Baker vs. Drake	127	Bank vs. Loeb	249, 248
Baker vs. Drake et al	425	Bank vs. Logan	296
Baker, Merrifield vs	390	Bank, Loyd vs.	248
Baker, Neevins vs.	389	Bank vs. Marshall	82
Baker vs. Smith	106	Bank, Means vs	300
Baldwin vs. Bradley	249, 246	Bank vs. Meyer	296
Baldwin vs. Ely	461	Bank vs. Maureau et als	510
Bank, Burnap vs.	248	Bank vs. Moreau	507
Bank vs. Dean et al.	341	Bank vs. Nomeyer	296
Bank, Deering vs.	390	Bank, Oates vs	280
Bank, Emery vs.	296	Bank, Railroad Co. vs	280
Bank vs. Fisher	296	Bank of Randall, Means vs	47, 13
Bank vs. Galley	341	Bank, Rowan vs.	231
Bank, Givanovich vs.	280, 349, 461	Bank, Saloy vs.	349, 461
Bank vs. Hanson	248	Bank, Searight vs	248
Bank vs. Harkness	120	Bank, Soule vs	390
Bank vs. Harris	248	Bank, State vs.	482, 507, 510
Bank vs. Hingham Co.	373	Bank, Stern vs.	280
Bank, Holmes vs	296	Bank, Stern Bros. vs	191
Bank vs. Janin	110, 98	Bank, Thompson vs	383
Bank vs. Kelly	296	Bank vs. Vanderhorst	282, 274
Bank vs. Knapp	154, 26	Bank vs. Wiltz	248

	PAGE		PAGE
Banking Co., Lewis vs.	300	Bowman, Dewey vs.	59
Banking Co., Woolly vs.	248	Boyce, National Bank vs.	341
Bannen, Wilson vs.	154	Boyd vs. Chaffe.	71
Barber, Starret vs.	231	Boyd, Hardin vs.	158
Barker, Delauney vs.	435	Boynton vs. Payroux.	127
Barnard vs. Campbell.	461	Boyson vs. Coles.	435
Barton, Roscarrick vs.	556	Bradley, Baldwin vs.	249, 246
Batner, Herrins vs.	395	Bradley, Lee vs.	133
Bauze, Senechal vs.	249	Brady et al., Beck & Co. vs.	477
Baxter, Parker vs.	461	Breaux, Jaures vs.	210
Bay, Codington vs.	280	Brewster vs. Hartley.	148
Bayard, Romero vs.	249	Brockway vs. Express Co.	324
Beck & Co. vs Brady et al.	477	Brother vs. Saul.	215
Beer, Gumbel vs.	296	Brown, Arnold vs.	479
Belknap vs. Gleason.	158	Brown, Bain vs.	268
Beltran & Co., Webre Syndic vs.	509	Brown, Finn vs.	372
Benjamin, Succession of.	513	Brown vs. Ins. Co.	161
Bennett, Geddes vs.	118	Brown, Walker vs.	497
Bernard, Coggs vs.	206, 186	Brownrigg, Navulshaw vs.	437
Best, Waller vs.	479	Bruce vs. Forbes.	390
Billet vs. Woods.	248	Bry, Hanna vs.	31
Bird vs. Cockren.	191, 280	Bryant, State Bank vs.	341
Blanc vs. Herzog.	154, 26	Buckley, Hanchett vs.	341
Blanchard, Landry vs.	507	Building Association vs. Fergu- son	282
Blanchard, White vs.	210	Bullard, Gause vs.	482
Blevins, Farmers' Bank vs.	341	Burdon Sugar Refining Co. vs. Payne.	517
Bodley, Goodrich vs.	470	Burdich et als., Seewall vs.	300, 296
Boldero, Godsall vs.	406	Burgess vs. Seligman.	374
Bombach vs. Insurance Co.	401	Burham vs. C. V. S. Co.	341, 387
Boone, Wallis vs.	210	Burke, Forbes vs.	55
Bossiere, Kennedy vs.	70	Burnap vs. Bank.	248
Bouchereau, LeBlanc vs.	106	Burnes, Greenbaum vs.	341
Bowerman, Adams vs.	461		
Bowers, Taylor vs.	77		

C

C. V. S. Co., Burham vs.	341, 387	Cavaroc, Casey vs.	516, 220, 113, 97, 95, 80 15
Caffin vs. Kirwan.	57	Cerf, Windham vs.	71
Cammack vs. Armstrong.	401	Cassation, Court of.	318, 297, 93, 54
Campbell, Bernard vs.	461	Chaffe, Boyd vs.	71
Campbell vs. Slidell.	215	Chaffe & Sons vs. DuBose.	175
Capel, Cooper vs.	488	Chapman vs. McIlrath.	390
Caperton vs. McComick.	120	Chester, Taylor vs.	73
Carraby, Gravier vs.	71	Chicago Dock Co. vs. Foster.	358
Carriere, Tua vs.	477	Citizens Bank of La. vs. Cotton Press Co.	468
Carter vs. Merrill & Co.	341, 357	Citizens Bank of La. vs. Heirs of Gray.	468
Cartwright vs. Wilmerdin.	439, 358, 355	Citizens Bank vs. Maureau.	482
Case, Henderson vs.	191	City Bank vs. Ass. Co.	390
Case vs. Kloppenburg.	487	Clark, France vs.	383
Case, National Bank vs.	370	Clark et al., Hubert vs.	26
Casey vs. Cavaroc.	516, 220, 113, 97, 95, 80, 15	Clark, Hulbert vs.	158
Casey vs. Credit Mobilier.	216		
Casey, Martin vs.	507		

TABLE OF CASES CITED.

xxiii

PAGE	PAGE
Clark, McCalla vs.....231	Corcoran, Hall vs.....73
Clark vs. Iselin.....95	Corlet vs. Underwood.....431
Cochran & Co. vs. Walker.....507	Corning, Porter vs.....215
Cockren, Bird vs.....191, 280	Cosgrove, Lawler & Hugh vs.....106
Codington vs. Bay.....280	Cotton Press Company, Citizens
Coeverdrey vs. Vandenberg.....280	Bank vs.....468
Coggs vs. Bernard.....206, 186	Cotton Press Company, St. Romes
Coldeleugh vs. Johnson.....158	vs.....31
Coles, Boyson vs.....435	County vs. Huchburger.....248
Coles, Martini vs.....300, 435	Court of Cassation.....318, 297, 93, 54
Colgate & Co. vs. Penn & Co. 300, 296	Cox vs. United States.....326, 321
Collins vs. Dauley.....390	Crain vs. Paine.....390
Collins vs. Pellerin.....106	Credit Lyonnais, Jacobi vs.....324
Collins vs. Ralli.....357	Credit Mobilier, Casey vs.....216
Combs vs. Tutchett.....120	Creditors, Delogny vs.....511
Commercial Bank vs. Hunt.....341	Creditors, Fields vs.....484
Comstock vs. Hier.....280	Creditors, Hanna vs.....477
Conger vs. New Orleans.....154, 26	Creditors, Jacquet vs.....237, 117
Corn Exchange Bank vs. Am. D.	Creditors, Lallande vs.....298, 442
& T. Co.....341	Creditors, Levert vs.....71
Conner vs. Greyham.....313	Creditors, Marsin vs.....84
Conner vs. Hile.....313	Creditors, Martin vs.....341
Connors, Watts vs.....326	Creditors, Renshaw vs.....262, 237, 97
Conrad vs. Fisher.....341	Greyham, Conner vs.....313
Consolidated Association, Forstall	Crouley vs. Insurance Co.....390
vs.....468	Crowley vs. Savings Bank.....461
Cook vs. Tullis.....216	Currier vs. Howard.....390
Cooper vs. Capel.....488	Cutter, Rice vs.....312
Cooper vs. Roy.....206	

D

Dalby vs. India and London Life	Deloach vs. Jones.....133
Insurance Co.....407	Delop & Co. vs. Windsor & Ran-
Daniels, Thayer vs.....32	doph.....98
Daubigny vs. Duval.....435	D'Meza's Succession.....48
Dauley, Collins vs.....390	Dewey vs. Bowman.....59
Davies, McCombie vs.....435	Dillon vs. Poirier.....488
Davis vs. Holbrook.....71	Ditson vs. Randall.....358
Davis, Pengh vs.....260	Dixon vs. National Life Ins. Co. 405
Davis, Stewart vs.....73	Dolhonde's Succession.....175
Davis, Warnock vs.....401	Dolliver, Thompson vs.....47, 12
Daws vs. Kidder.....313	Donaldson vs. Farrell.....213
Dean et al., Bank vs.....341	Donald vs. Suckling.....205, 203, 188
Dean vs. Martin.....71	Dorsey Co., Ayres & Reed Co. vs. 300
Dearborn, Tucker vs.....296	Drake, Baker vs.....127
Debliens et al., Mineral Water	Drake et al., Baker vs.....425
Company vs.....379	Drake, Stewart vs.....385
DeBlois vs. Reiss.....85	Dreyfus, Freiburg vs.....88
Deering vs. Bank.....390	Dry Dock Co., Insurance Co. vs. 378
Delauney vs. Barker.....435	DuBose, Chaffe & Sons vs.....175
Delaware, The.....321	Ducasse vs. McKenna.....175
Delgado vs. Wilbur.....305, 296	Dunlap, Pepper vs.....246
Delogny vs. Creditors.....511	Duval, Daubigny vs.....435

H

	PAGE		PAGE
Eckel vs. Reros	405	Emons, Miller vs	52
Edson vs. Freret	477	Estate, Handy's	56
Elder vs. Rouse	246	Express Co., Brockway vs	324
Ellis vs. Krentzinger	395, 389	Express Co., Fitzsimmons vs	269
Elton, Pritchard vs	260	Eyeshimer, Stover vs	53
Ely, Baldwin vs	461	Ezekiel, Schiff vs	488
Emery vs. Bank	296		

F

Farmers' Bank vs. Blevins	341	Fitzpatrick vs. Insurance Co	405
Farwell, Donaldson vs	213	Fitzsimmons vs. Express Co	269
Feagin, Schiffer vs	248	Flagg vs. Mann	496
Fenley vs. Pritchard	127	Florsheim Bros. vs. Howell, Phelps & Co	128
Ferguson, Building Association vs	282	Forbes, Bruce vs	390
Fielding vs. Kymer	435, 300	Forbes vs. Burke	55
Fields vs. Creditors	484	Forstall vs. Consolidated Associa- tion	468
Finch vs. Mansfield	329	Forsyth et al., Union Bank vs	263
Finn vs. Brown	372	Foster, Chicago Dock Co. vs	358
Fishe, Hazard vs	358, 341	Fourth Street Bank vs. Yardley	499
Fisher, Bank vs	296	France vs. Clark	383
Fisher, Conrad vs	341	Freiburg vs. Dreyfus	88
Fisher vs. Gardely	210	Freret, Edson vs	477
Fisher vs. Kyle	73		
Fisher vs. Seligman	374		

G

Gaither, Gates vs	99	Goodwin, Abbot vs	120
Galley, Bank vs	341	Goodwin vs. Loan Co	280, 441
Gates vs. Gaither	99	Gottlieb vs. Hartman	195
Gay vs. Moss	95	Gordely, Fisher vs	210
Gause vs. Bullard	482	Gover, Price vs	385
Gayarre vs. Tunnard	484	Grant, Shaw & Co. vs	507
Geddes vs. Bennett	118	Gravier vs. Carraby	71
Gerdau, Soltan vs	357, 457, 462	Green, King vs	73
Gibson vs. Stevens	358, 341	Greenbaum vs. Burnes	341
Gibson vs. Warden	215	Griswold vs. Seligman	374
Gill vs. Kymer	300, 435	Gruman vs. Smith	127
Gillet et al. vs. Whiting	426	Guichard vs. Morgan	300
Gillet vs. Whitney	127	Grant, Insurance Co. vs	390
Gilpin vs. Howell	385	Greenwell vs. Haydon	273
Givanovich vs. Bank	349, 280, 461	Guerdon, Norwood vs	390
Gleason, Belknap vs	158	Guibert, Lloyd vs	324
Gloster, Morton vs	73	Guichard vs. Morgan	435
Godsall vs. Boldero	406	Gumbel vs. Beer	296
Goodrich vs. Bodley	470		

H

	PAGE		PAGE
Hale vs. Milwaukee Dock Co.....	341	Hilliker vs. Kuhn.....	120, 117
Hali vs. Coresran.....	73	Hills vs. Smith.....	231
Halliday vs. Holgate.....	206	Hilton vs. Tucker.....	127
Halsey vs. Warden.....	296	Hingham Co., Bank vs.....	373
Hamlet, Sumner vs.....	120	Hobson vs. Trevor.....	52
Hanchett vs. Buckley.....	341	Hodgkin, U. S. Mutual Ass'n vs.....	405
Hancock vs. Insurance Co.....	158, 26	Hogan vs. Soupayrac.....	48, 38
Handy's Estate.....	56	Holbrook, Davis vs.....	71
Hanna vs. Bry.....	31	Holgate, Halliday vs.....	206
Hanna vs. Creditors.....	477	Holmes vs. Bank.....	296
Hanover Bank vs. Am. D. & T. Co.....	341	Holton & Winn vs. Hubbard & Co.....	348
Hanson, Bank vs.....	248	Honold vs. Meyer.....	461, 313
Hardie vs. Wright.....	248	Honor vs. Sheriff.....	210
Hardin vs. Boyds.....	158	Horton vs. Morgan.....	385
Harkness, Bank vs.....	120	Hoss et al. vs. Williams.....	482
Harris, Bank vs.....	248	Howard, Currier vs.....	390
Harris, Parker & Co. vs. Nicolo- poalo.....	347, 343	Howe vs. Austin.....	99
Hart, Taussig vs.....	385	Howe vs. Powell.....	106
Hartley, Brewster vs.....	148	Howell, Gilpin vs.....	385
Hartman, Gottlieb vs.....	195	Howell, Phelps & Co., Florsheim Bros. vs.....	128
Hawkins, Lewis vs.....	158	Howland vs. Woodruff.....	357, 439
Haydon, Greenwell vs.....	273	Hubbard & Co., Holton & Winn vs.....	348
Hayes, Wood vs.....	385	Hubert vs. Clark et al.....	26
Hazard vs. Fische.....	358, 341	Huchburger, County vs.....	248
Hazzard, Life Insurance Co. vs.....	401	Hughes, Hyllested & Co. vs. Klin- gender Bros.....	98
Heber vs. Thompson.....	99	Hubert vs. Clark.....	158
Heerins vs. Batner.....	395	Hunt, Commercial Bank vs.....	341
Heirs of Gray, Citizens Bank of Louisiana vs.....	468	Hunt vs. Rousmanier.....	238, 97
Henderson vs. Case.....	280, 191	Hunt & Macauley vs. Railroad Co.....	320, 309
Hentz vs. Miller.....	357	Husband, Marot vs.....	210
Hertz, Vickers vs.....	437	Hyde, Stockton vs.....	477
Herzog, Blanc vs.....	154, 26		
Hier, Comstock vs.....	280		
Hile, Conner vs.....	313		

I

India and London Life Insurance Co., Dalby vs.....	407	Insurance Co. vs. Grant.....	390
Ingersoll et al., Williams et al. vs.....	34	Insurance Co. Hanesek vs.....	158, 26
Ingraham, Lallande vs.....	133	Insurance Co. vs. Kjer.....	346, 341
Insurance Co., Bombach vs.....	401	Insurance Co., Lynde vs.....	395
Insurance Co., Brown vs.....	161	Insurance Co., Norton vs.....	390
Insurance Co., Crowley vs.....	390	Insurance Co., Sherman vs.....	390
Insurance Co. vs. Dry Dock Com- pany.....	378	Insurance Co., Webster vs.....	390
Insurance Co. Fitzpatrick vs.....	405	Insurance Co., Wheeler vs.....	519, 515
		Iselin, Clarke vs.....	95
		Israel, Turner vs.....	300

J

	PAGE		PAGE
Jackson vs. Lemle.....	106	Jerome vs. McCarter.....	265, 236, 213
Jackson, Parsons vs.....	280	Jewett vs. Warren.....	132
Jacobi vs. Credit Lyonnais.....	324	Jones, Deloach vs.....	133
Jacquet vs. Creditors.....	237, 117	Jones, Moore & Janney vs.....	373
James, Poche vs.....	479	Johnson, Agnew vs.....	195
Janin, Bank vs.....	110, 93	Johnson, Coldcleugh vs.....	158
Jarvis, Joslin vs.....	269	Johnson, Pitot vs.....	378, 377
Jarvis vs. Rogers.....	249, 248, 188	Johnson vs. Stear.....	206
Jaudon, Markham vs.....	127, 420, 421	Johnson vs. Van Epps.....	401
Jaures vs. Breaux.....	210	Joslin vs. Jarvis.....	269
Jaures vs. Pike.....	69	Joy vs. Adams.....	158
Jenness, Peck vs.....	477		

K

Kaltenback vs. Lewis.....	437	Kittridge vs. Warren.....	479
Kelly, Bank vs.....	296	Klingender Bros., Hughes, Hylle-	
Kennedy vs. Bossiere.....	70	sted & Co. vs.....	98
Ketchum vs. St. Louis.....	502	Kloppenburger, Case vs.....	487
Keyes et al., Olmstead vs.....	405	Knapp, Bank vs.....	154, 26
Kidder, Daws vs.....	313	Knowlton, Spring Co. vs.....	77
Kidder, Moore vs.....	358	Knox, Tiedman vs.....	311, 342
Kijer, Insurance Co. vs.....	346, 341	Kreutzinger, Ellis vs.....	389, 395
Kimbal, Stokell vs.....	401	Kuhn, Hilliker vs.....	120, 117
King vs. Green.....	73	Kyle, Fisher vs.....	73
Kirkpatrick & Co. vs. Oldham.....	210	Kymer, Fielding vs.....	300, 435
Kirwan, Callin vs.....	57	Kymer, Gill vs.....	300, 435

L

Labaurie vs. Woods.....	488	Lemle, Jackson vs.....	106
Labouisse vs. Rope Co.....	507	Leristones, Wickham vs.....	114
Lacombe, Steward vs.....	489	Lever vs. Creditors.....	71
Laird, Bank vs.....	246	Levy vs. Wise.....	70
Lalaurie et als., Morris et al. vs.....	507	Lewis vs. Banking Co.....	300
Lallande vs. Ingraham.....	133	Lewis vs. Hawkins.....	158
Lallande vs. His Creditors.....	298, 442	Lewis vs. Mott.....	188
Laloire vs. Wiltz.....	248	Lewis, Kaltenback vs.....	437
Lamar vs. Micon.....	326	Life Insurance Co. vs. Hazzard.....	401
Lambeth, Moore vs.....	313	Little, Wilson vs.....	147
Lambert, Young vs.....	341	Liverpool Steam Co. vs. Phoenix	
Lanaux' Succession.....	112	Ins. Co.....	333, 324
Landry vs. Blanchard.....	507	Lloyd vs. Guibert.....	324
Latham vs. Bank.....	390	Loan Company, Goodwin vs.....	280, 441
Lathrop, Ogden vs.....	206	Loan and Trust Co., Pauly vs.....	376
Lawler & Hugh vs. Cosgrove.....	106	Loeb, Bank vs.....	249, 248
Lawrence vs. Maxwell.....	206	Logan, Bank vs.....	296
LeBlanc vs. Bouchereau.....	106	London Joint Bank vs. Simmons.....	300
Lecroy vs. Waite.....	385	Loyd vs. Bank.....	248
Lee vs. Bradley.....	133	Lynde vs. Insurance Co.....	395
Le Merchant vs. Moore.....	383	Lynn, Penney vs.....	56

M

	PAGE		PAGE
Macon Bank, Nesbit vs.....	369	Meyers vs. Schuman.....	405
Mann, Flagg vs.....	496	Micon, Lamar vs.....	326
Mansfield, Finch vs.....	329	Milford, Milford vs.....	216
Markham vs. Jaudon.....	127, 420, 421	Miller vs. Emons.....	52
Marot vs. Husband.....	210	Miller, Hentz vs.....	357
Marshall, Bank vs.....	82	Miller vs. Shotwell.....	106, 102
Marshall, Tanneret vs.....	71	Milwaukee Dock Co., Hale vs.....	341
Marth vs. Whitmore.....	268	Mineral Water Co. vs. Deblieux et al.....	379
Martin vs. Casey.....	507	Mitchell vs. Winslow.....	216
Martin vs. Coles.....	435	Monticon vs. Mullen.....	31
Martin vs. Creditors.....	84, 341	Moore & Janney vs. Jones.....	373
Martin, Dean vs.....	71	Moore vs. Kidder.....	358
Martin vs. Stebbins.....	405	Moore vs. Lambeth.....	313
Martini vs. Coles.....	300	Moore, Le Merchant vs.....	383
Matthews vs. Albert.....	373	Moreau, Bank vs.....	507
Matthews & Finlay vs. Their Cred- itors.....	474	Morgan, Guichard vs.....	300, 435
Matthews, Finlay & Co. vs. Ruth- erford.....	287, 90	Morgan, Horton vs.....	385
Maureau, Citizens Bank vs.....	482, 510	Morris et al vs. Lalaurie et als.....	507
Maxwell, Lawrence vs.....	206	Morris vs. Sheriff.....	246
Means vs. Bank of Randall.....	300,	Morris, Ware vs.....	106
	47, 13	Morton vs. Gloster.....	73
Merrifield vs. Baker.....	390	Moss, Gay vs.....	95
Merrill, Palmer vs.....	390	Mott, Lewis vs.....	188
Merill & Co., Carter vs.....	341, 357	Mullen, Monticon vs.....	31
Meyer, Bank vs.....	296	Muller vs. Ponder.....	281
Meyer, Honold vs.....	313, 461	Murphy vs. Red.....	405
		Mutual Company vs Allen.....	405

Mc

McCalla vs. Clark.....	231	McCullough vs. Roots.....	341
McCarter, Jerome vs.....	265, 236, 213	McIlrath, Chapman vs.....	390
McCombie vs. Davies.....	435	McKenna, Ducasse vs.....	175
McCormick, Caperton vs.....	120		

N

National Bank vs. Boyce.....	341	New Orleans, Conger vs.....	154, 26
National Bank vs. Case.....	370	Newsom vs. Thornton.....	435, 300
National Life Insurance Co., Dixon vs.....	405	Nicolopalo, Harris, Parker & Co. vs.....	347, 343
Navulshaw vs. Brownrigg.....	437	Nickerson, Pope vs.....	324
Nelson & Co. vs. Simpson.....	477	Nisbit vs. Trust Co.....	120
Nesbit vs. Macon Bank.....	369	Noimeyer, Bank vs.....	296
Nettles, Allen, Bush & West vs.	243, 237, 97	Northampton, Salt vs.....	390
Neevins vs. Baker.....	389	Norton vs. Insurance Co.....	390
Neven vs. Roup.....	132	Norton. Pritchard vs.....	326
		Norwood vs. Guerdon.....	390

O

	PAGE		PAGE
Oates vs. Bank.....	280	Olmstead vs. Keyes et al.....	405
Ogden vs. Lathrop.....	206	Ory, Winchester vs	133
Oldham, Kirkpatrick & Co. vs.....	210		

P

Paine, Crain vs.....	390	Pickens vs. Sheriff.....	487
Palmer vs. Merrill	390	Piffet et als., Publishing Co. vs.....	470
Parker vs. Baxter.....	461	Pike, Jaures vs	69
Parsons vs. Jackson.....	280	Pitot vs. Johnson	378, 377
Pauly vs. Loan and Trust Co.....	376	Pollard vs. Vinton	321, 299
Payne, Burdon Sugar Ref. Co. vs.....	517	Pond, Andrews vs	321
Payroux, Boynton vs	127	Ponder, Muller vs	281
Peck vs. Jenness.....	477	Pope vs. Nickerson	324
Pellerin, Collins vs	106	Porter vs. Corring	215
Peninsular Co. vs. Shand.....	324	Powell, Howe vs	106
Penn Co., Colgate & Co. vs	300, 296	Price vs. Gover	385
Penney vs. Lynn	53	Pritchard vs. Elton	260
Pepper vs. Dunlap	246	Pritchard, Fenley vs	127
Peugh vs. Davis	260	Pritchard vs. Norton	326
Phoenix Ins. Co., Liverpool Steam Co. vs.....	333, 324	Publishing Company vs. Piffet et als	470
Piche vs. James	479	Putnam vs. Upton.....	370

R

Railey vs. Row.....	231	Ritter vs. Smith.....	405
Railroad Co. vs. Bank	280	Robb vs. Wagner	488
Railroad Co., Hunt-McCauley vs.....	320, 309	Rogers, Jarvis vs.....	249, 248, 188
Railroad Company, Shaw vs.....	307, 319, 445	Romero vs. Bayard	249
Railroad Co., Woodward vs.....	114	Roots, McCullough vs	341
Ralli, Collins vs.....	357	Rope Company, Labouisse vs.....	507
Randall, Ditson vs.....	358	Roscarriek vs. Barton	556
Ray, Cooper vs.....	206	Roup, Neven vs.....	132
Red, Murphy vs.....	405	Rouse, Elder vs	246
Reiss, DeBlois vs.....	85	Rousmanier, Hunt vs.....	238, 97
Renshaw vs. Creditors.....	262, 237, 97	Rousseau, Succession of	482
Reros, Eckel vs.....	405	Row, Railey vs.....	231
Rice vs. Cutter	312	Rowan vs. Bank	231
Rice vs. Wood.....	269	Russell, Shropshire vs.....	507
Richardson vs. Bank.....	296	Russell vs. Southard	260
		Rutherford, Matthews, Finley & Co. vs.....	232, 90

S

Saloy vs. Bank	461	Saul, Brother vs.....	215
Salsy vs. Bank.....	349	Savings Bank, Crowley vs.....	461
Salt vs. Northampton.....	390	Savings Bank, Tucker vs.....	273

TABLE OF CASES CITED.

xxix

PAGE	PAGE
Savings Co., Talty vs.....188	Spruance, Tewbury vs.....268
Savings Institution, Yeatman vs.....213	St. Louis Bank, Allen vs.....
Sawyer vs. Upton.....370	446, 439, 437, 436
Schiff vs. Ezekiel.....488	St. Louis, Ketchum vs.....502
Schiffer vs. Feagin.....248	St. Romes vs. Cotton Drew Co.....31
Schuman, Meyers vs.....405	Starret vs. Barber.....231
Scudder vs. Union Bank.....321, 326	State vs. Bank.....482, 507, 510
Searight vs. Bank.....248	State vs. Toulmison.....390
Seewall vs. Burdrieh et als.....300, 296	State Bank vs. Bryant.....341
Seligman, Burgess vs.....374	Steamer, Swasey & Co. vs.....507
Seligman, Fisher vs.....374	Stear, Johnson vs.....206
Seligman, Griswold vs.....374	Stebbins, Martin vs.....405
Senecal vs. Bauze.....249	Stern vs. Bank.....280
Shand, Peninsular Co. vs.....324	Stern Bros. vs. Bank.....191
Shaw vs. Railroad Co.....445, 319, 307	Stevens, Gibson vs.....358, 341
Shaw vs. Silloway.....158	Stevens vs. Warren.....401
Shaw & Co. vs. Grant.....507	Stevens vs. Wilson.....439
Sheriff, Hornor vs.....210	Steward vs. Lacombe.....489
Sheriff, Morris vs.....246	Stewart vs. Davis.....73
Sheriff, Pickens vs.....487	Stewart vs. Drake.....385
Sheriff vs. Stoddard.....429	Stockton vs. Hyde.....477
Sherman vs. Insurance Co.....390	Stoddard, Sheriff vs.....429
Shotwell, Miller vs.....106, 102	Stoddard, Skiff vs.....385, 429, 425
Shropshire vs. Russell.....507	Stokell vs. Kimbal.....401
Silloway, Shaw vs.....158	Stone, Succession of.....474
Simpson, Nelson & Co. vs.....477	Stout vs. Yager Milling Co.....390
Skiff vs. Stoddard.....429, 425, 385	Stover vs. Eycleshimer.....53
Slaughterhouse Co., Smith vs.....378	Sturges, Adams vs.....248
Slidell, Campbell vs.....215	Succession, Argote's.....55
Slocomb, Union Bank vs.....248	Succession of Benjamin.....513
Smith, Allen vs.....120	Succession, D'Meza's.....48
Smith, Antoine vs.....71	Succession, Dolhonde's.....175
Smith, Baker vs.....106	Succession, Lanaux'.....112
Smith, Gruman vs.....127	Succession of Rousseau.....482
Smith, Hills vs.....231	Succession of Stone.....474
Smith, Ritter vs.....405	Succession of Walsh.....508
Smith vs. Slaughterhouse Co.....378	Suckling, Donald vs.....205, 203, 188
Soltau vs. Gerdau.....457	Suit vs. Woodhall.....329
Sompayrac, Hogan vs.....48, 38	Sumner vs. Hamlet.....120
Soule vs. Bank.....390	Sumner, Whitaker vs.....206
Soltau vs. Gerdau.....357, 462	Swasey & Co. vs. Steamer.....507
Southard, Russell vs.....260	Swift vs. Tyson.....280
Spring Co. vs. Knowlton.....77	

T

Talty vs. Savings Co.....188	The Delaware.....321
Tanneret vs. Marshall.....71	The Thames.....321
Taussig vs. Hart.....385	Thibodaux vs. Anderson.....99
Taylor vs. Bowers.....77	Thompson vs. Bank.....383
Taylor vs. Chester.....73	Thompson vs. Dolliver.....47, 12
Tewbury vs. Spruance.....268	Thompson, Heber vs.....91
Texas vs. White.....195, 280	Thompson vs. Toland.....385
Thames, The.....321	Thornton, Newsom vs.....300, 435
Thayer vs. Daniels.....32	Tibbotts, Whitney vs.....132

	PAGE		PAGE
Tiedman vs. Knox.....	311, 342	Tua vs. Carriere.....	477
Toland, Thompson vs.....	385	Tucker vs. Dearborn.....	296
Tomlinson, State vs.....	390	Tucker, Hilton vs.....	127
Torney, Worthington vs.....	385	Tucker vs. Savings Bank.....	273
Trebilock, Upton vs.....	370	Tullis, Cook vs.....	216
Trevor, Hobson vs.....	52	Tunnard, Gayarre vs.....	484
Trumbal, Trust Co. vs.....	120	Turner vs. Israel.....	300
Trumbull, Union Trust Co. vs.....	300	Tutchett, Combs vs.....	120
Trust Co., Nisbit vs.....	120	Tyson, Swift vs.....	280
Trust Co. vs. Trumbal.....	120		

U

Upton, Putnam vs.....	370	Union Trust Company vs. Trum-	
Upton, Sawyer vs.....	370	bull.....	300
Upton vs. Trebilock.....	370	United States, Cox vs.....	326, 321
Upton, Webster vs.....	360	Underwood, Corlet vs.....	431
Union Bank vs. Forsyth et al.....	263	U. S. Mutual Association vs.	
Union Bank, Scudder vs.....	321, 326	Hodgkin.....	405
Union Bank vs. Slocomb.....	248		

V

Vandenberg, Coevdrey vs.....	280	Vermilye vs. Adams.....	195, 280
Vanderhorst, Bank vs.....	282, 274	Vickers vs. Hertz.....	437
Van Epps, Johnson vs.....	401	Vinton, Pollard vs.....	321, 299
Variol, Auje vs.....	210		

W

Wagner, Robb vs.....	488	Whitaker vs. Sumner.....	206
Waite, Lecroy vs.....	385	White vs. Blanchard.....	210
Walsh, Arick vs.....	488	White, Texas vs.....	195, 280
Walker vs. Brown.....	497	White, Whitten vs.....	226
Walker, Cochran & Co. vs.....	507	Whiting, Gillet et al. vs.....	426
Walker vs. Walker.....	241	Whitney, Gillet vs.....	127
Waller vs. Best.....	479	Whitney vs. Tibbotts.....	132
Walsh, Succession of.....	508	Whitmore, Marth vs.....	268
Warden, Gibson vs.....	215	Whitten vs. White.....	226
Warden, Halsey vs.....	296	Wilbur, Delgado vs.....	305, 296
Ware vs. Morris.....	103	Wickham vs. Leristones.....	114
Warehouse Co., Anderson vs.....	372	Williams et al. vs. Ingersoll.....	34, 502
Warnock vs. Davis.....	401	Willis vs. Boone.....	210
Warren, Jewett vs.....	132	Wilmerding, Cartwright vs.....	355,
Warren, Kittredge vs.....	479		358, 439
Warren, Stevens vs.....	401	Wilson vs. Bannen.....	154
Watts vs. Connors.....	326	Wilson vs. Little.....	147
Weil vs. Insurance Co.....	390	Wilson, Stevens vs.....	439
Webre, Syndic, vs. Beltran & Co.....	509	Wiltz, Bank vs.....	248
Webster vs. Insurance Co.....	390	Wiltz, Laloire vs.....	248
Webster vs. Upton.....	370	Winchester vs. Ory.....	133
Wheeler vs. Insurance Co.....	515, 519	Windham vs. Cerf.....	71

TABLE OF CASES CITED.

XXXI

	PAGE		PAGE
Winslow, Mitchell vs.....	216	Woodhall, Suit vs.....	329
Windsor & Randolph, Delop & Co. vs.....	98	Woodruff, Howland vs.....	357, 139
Wise, Levy vs.....	70	Woods, Billet vs.....	248
Wright, Hardie vs.....	248	Woods, Labaurie vs.....	488
Wolf vs. Wolf.....	94	Woodward vs. Railroad Co.....	114
Wood, Rice vs.....	269	Worthington vs. Torney.....	385
Wood vs. Hayes.....	385	Woolly vs. Banking Co.....	248

Y

Yager Milling Company, Stout vs. 390	Yeatman vs. Savings Institution .. 213
Yardley, Fourth Street Bank vs .. 499	Young vs. Lambert..... 341

A TREATISE

ON THE LAW OF THE

CONTRACT OF PLEDGE

AS GOVERNED BY BOTH THE

Common Law and Civil Law.

CHAPTER I.

INTRODUCTION.

When men, in their business relations, do not trust each other, the creditor demands of the debtor securities for the fulfilment of his obligation. The securities are either real or personal securities. In the Common law, real securities are those which rest upon the realty, land or buildings; and personal securities are those which rest upon the personalty, or personal property, and also those which depend upon the personal obligation of a surety, warrantor, or endorser.

In the Civil law real securities are those which rest upon the *thing* given as security, the *res*, whether it is realty or personalty, or, in the terms of the Civil law, movable or immovable property; and the personal securities are those which rest upon the obligation of a person, such as that of a surety, or warrantor, or endorser. A mortgage on land is a real security, both in the Common law and the Civil law. But a pledge is a personal security in the Common law, while it is a real security in the Civil law. Hence, the contract of pledge is a personal contract in the Common law, and a real contract in the Civil law.

And hence, the action to enforce the pledge is a personal one at Common law, and a real one in the Civil law. Yet, the pledge performs the same office and it is of the same utility, though it presents great differences, in the two systems of law.

THE CONTRACT OF PLEDGE.

I do not propose to define the contract of pledge. There are already numerous definitions of it. Many of them are defective; very few are instructive or useful. Definitions, at best, seldom convey knowledge or information, and they sometimes create confusion. As the Latin maxim says: *Omnia definitio in lege periculosa est*. Every broker, banker, merchant, knows what a pledge is, without the law writer defining it. But let us look into its origin, its history, its nature, its rules and its effects.

The pledge springs from natural law and is of the farthest antiquity. It was used as a means of securing a debt in the primitive relations of men. We find it in the Mosaic law. "No man shall take the nether or the upper millstone to pledge; for he taketh a man's life to pledge."—Deuteronomy, Chapter xxix, 6.*

It is curious to observe in this provision of the Mosaic law, not only the mention of pledge in the early days of the Hebrews, but also the exemption from the creditor's reach of the tools and instruments by which the debtor gains a living, a rule of law which is so salient in the modern legislation of civilized nations.

The same prohibition to pledge the tools of the artisan is found in the Roman law and in the early law of France.†

The Greeks in their earliest commercial transactions

* See also Secs. 10, 11, 12, 13, *Ibid*.

† Dig. L. 6 and 7; Domat. Pawns. XXV. Cushing Ed

made great use of the pledge, as all trading nations must necessarily do. It is from them also that the Romans took the mortgage or *hypotheca*, which, in its incipency, strongly resembled the pledge. The *hypotheca* covered both real and personal property, as the pledge, the *pignus*, did. Though possession did not follow the *hypotheca* or mortgage, as it did the pledge, the distinctions which later jurisprudence established between those real securities barely existed at first. The Roman juriconsult said: "*Inter pignus et hypothecam tantum nominis sonus differt.*"

The *mortgage* of the old French law itself was, at first, the *dead pledge*, *mortuum vadum*, the pledge of land of which the revenue or fruits belonged to the creditor.*

But long before the mortgage was introduced into the legislation of the Romans, the pledge of real estate had been established among them. By the early pignorative contract known as the *fiducia*, the land owner secured his debt by transferring the possession of his land to his creditor.

The word *pledge* comes from the old French law term *pleige*, which meant a surety, consequently a personal security, not the real security of the pledge or pawn. The ancient French law writers, to mark the superiority of the pledge over the suretyship, said: "*Pleige plaide et gage rend.*" The surety pleads, or resists, but the pledge pays.

The pledge in the Civil law applies to real estate as

* Baudry-Lacantinerie, Nantissement, page xvii.

well as to personal property. In the first case it takes the name of *Antichresis*, which is also of Grecian origin. But it is in the pledge or pawn of personal property that we find the immense importance of the subject in the present age of vast financial and commercial transactions. Trade is the support of the world. It is by it that nations become prosperous, great and powerful. It has given England the maritime empire of the universe. It gave Venice its once formidable power. It gave the Italian republics of the middle ages their wealth and importance. It is the principal factor of the phenomenal prosperity and riches of the United States of America. The aristocratic and military countries which affect to despise trade and tradesmen are fed and maintained by it, and would fall without it. When Napoleon expressed his contemptuous opinion of the English in saying that they were *a nation of merchants*, he was giving the very reason of the enormous strength which finally mastered his own genius.

But trade without credit to help it would be emasculated and paralyzed. It is credit that builds up trade at home and carries it round the world. The rich as well as the poor need credit in commercial business, for it is seldom that trade is carried on upon a cash basis entirely. With a capital of \$100,000 a merchant will extend his mercantile or financial operations to the amount of \$1,000,000. But credit signifies the means of borrowing, and the means of borrowing are obtained by securing the loan. The

precept of Shakespeare: "Neither a borrower nor a lender be," is only true when the loan is unsecured.

To secure the loan necessary to commerce, the mortgage is too slow, too difficult of immediate and safe execution. It demands the investigation of title deeds, the discussion and framing of written contracts, the recording of the same. All this takes time, days or weeks, while the borrower must have his money immediately, or his venture may be lost. To secure the loan, therefore, there are only two available modes left in commercial transactions: either the personal security of the endorser or surety, or the real security of the pledge of personal property.

The former mode is objectionable in many respects. Persons able to pay the debt of the borrower which they guarantee are loath to bind themselves. The borrowers themselves are loath to ask for such services. The guaranties of endorsers and ordinary sureties are always more or less uncertain and may escape the vigilance of the creditor. Their ability to make good such securities is itself eventual. Finally, as we said above, in the words of the old French law writers, "*the surety resists, but the pledge pays,*" and as the Roman law expresses it: "*Plus est cautionis in re quam in persona.*"

The pledge is, therefore, the great security of the capitalist, banker and merchant, and conversely the means of the borrower to obtain the required loan.

It has become for that reason the most important and the most in use of all contracts of security in the

innumerable transactions of the great commercial cities of the world. In its rapid movements it passes from hand to hand, without dilatory formalities. It secures in the same day several and successive banking or other financial operations. It transmits capital to distant places, or draws it home. It takes the shape of bills of lading for that purpose. It takes the shape of the *margin* in the sale of futures, for money itself may be pledged. It takes the shape of bottomry bonds in maritime contingencies. It takes the shape of warehouse receipts when money is borrowed on merchandise at home. It takes the shape of policies of insurance either on life or property: so protean-like is the contract of pledge, so universal its necessity, so great the security it offers to the lender of money.

It rests, therefore, both upon natural law and the law of nations. It takes from equity its essential rules; and though it is submitted to some judicial forms, as to what will constitute the proof of it in the Civil law, it is not the less one of those contracts which are found among all nations, which are necessary in civil life, and which are interpreted everywhere by common principles of justice and honor.*

Cicero placed the contract of pledge among those principal acts of civil life of which the element is good faith.†

In the earlier days of modern civilization the pledge had been the subject and means of abuses which had

* Troplong, *Nantissement*, Sec. 33.

† III *De Officiis*, 17.

thrown a certain disfavor upon it. It had facilitated and covered fraudulent transactions in which dishonest debtors would screen and save their property from the reach of their creditors. It had also served to conceal usurious terms of credit which rapacious money lenders would impose upon hard pressed borrowers. For these reasons the legislators in the Civil law countries surrounded the contract of pledge with strict formalities and severe conditions, such as a written act or deed in which the sum loaned is fixed and the thing pledged is described minutely. But gradually the interest of commerce demanded the emancipation of the pledge ; facts, as usual, imposed their authority upon legislation ; the wants of the mercantile world had to be considered and protected, and, in commercial and financial transactions, the pledge was disencumbered of the obstructing requirements. Hence, both under the Common and the Civil law that contract is now effected by mere delivery of commercial paper or effects, and by endorsement if the same is made to order.

Troplong, the eminent Civil law writer of France, shows the all-important part which the pledge plays in the affairs of a merchant, in the following words : “The rapidity with which commercial business is carried on does not accommodate itself to the forms of the mortgage and the dilatoriness inseparable from landed securities. Besides, real estate is frequently mortgaged by merchants only at the last extremity. A stranger to the commercial movement, real estate

only becomes its auxiliary and surety by altering the conditions of the merchant's credit. In the normal state of a well-established commercial house, if its word alone is not sufficient to obtain confidence, it is on the merchandise on which it speculates that it must place the basis of its credit. The merchandise in that case does not cease to fulfil its destination; it is the natural security offered to third persons, and either by procuring money when sold, or by procuring it on a loan which it secures, it remains within its purpose, and its destiny. But when public confidence is not satisfied with either the word or the commercial assets of the merchant; when the capitalist only consents to lend him money on the security of things which are not mercantile; when it is necessary that the landed property come to the assistance of failing commercial credit, then it is a signal of distress and of trouble. That is why merchants of high commercial standing will not encumber their real estate. It is in the merchandise which constitute their assets that they put the confidence offered to third persons, and the safety of their transactions. Their real estate remains outside of their commercial ventures; they do not draw it into the movement of their speculations; they keep it away, on the contrary, because commercial business is prosperous only so far as it may depend upon its own resources." *

The contract of pledge may, therefore, well be said to be the pivot of commerce.

* Troplong, *Nantissement*. Preface, page xiv.

It has in modern times even a greater importance than it had formerly, owing to the immense development that personal or movable property has taken within the present century in every part of the civilized world. With the Romans and in the countries of Europe in ancient times, personal property was of comparative inferiority to real estate. "*Res mobilis res vilis*," was an expression used to show the poor estimation in which movable property was held. The wealth of those times consisted in landed estates and belonged almost exclusively to the nobility and the clergy. The law bearing upon immovable property or realty was, therefore, of much more importance and had attained a higher degree of perfection than that which governed personal property.

But within the nineteenth century, human industry, modern discoveries and inventions, the establishment of numerous corporations and joint stock companies, the opening of new avenues of commerce, have created a wealth of personal property, equal if not superior to that of real estate. The laws which govern it have grown in proportionate importance, and foremost among these laws that of the contract of pledge has taken a considerable development. But the law of pledge of the Civilians has necessarily progressed in a more methodical manner, and, therefore, reached a higher and earlier degree of improvement than that of the Common law. Statutory law provides for the future with such prevision or foresight as the human mind is susceptible of. Common law is formed in

proportion as new facts and new events arise, upon which it is based. It looks to the past, not the future. It moves, therefore, slowly and irregularly. Precedents have to be established before custom may be fixed and acquire the force of law. Judge Story, in speaking of some rules of the contract of pledge, says : “ Few cases have arisen upon this subject in the Common law ; and it would be unsafe to rely wholly upon the Civil law, as furnishing safe analysis for our guidance. In the absence, however, of any authority, the Civilians may assist our inquiries ; and for this purpose, Domat, in an especial manner, may be consulted with advantage.” *

A more recent writer of the Common law has made a similar acknowledgment and said : “ This whole doctrine of pledge is one which has unevenly developed at the Common law, and our rules are frequently derived from the Roman law of pledge, which, however, in many points differs from our own ; or else we borrow from the analogies of the chattel mortgage.” †

For those who will follow the advice of Judge Story, there are more modern and even better authorities to consult in the difficulties of the law of pledge than Domat, who was still fettered in the then unchanged principles of the Roman law. Those safer guides are the great commentators of the Code Napoleon, whose books have cleared the confusion of the ancient law of pledge and who expound the subject as it now stands in the modern Civil law.

* Story, on Bailments. Sec. 313.

† Schouler, on Bailments, pp. 233, 234.

There is still among those distinguished writers some diversity of opinion on certain minor points, which is inseparable from the discussion of legal doctrines ; but the Civil law of pledge altogether is at the present time fixed and established with far more precision than that of the Common law. In the latter there is yet a great deal of confusion and of disagreement between the text writers and the decisions of the courts. Some of these, being unbound by any rules prescribed by statutes, have departed widely from the original and even essential principles of the pledge proper, and have established a jurisprudence which it is sometimes difficult to reconcile with the definition of the pledge given by the commentators of the Common law itself, from Judge Story down to those of the present day.

A cause of confusion and uncertainty on that subject is to be found also in the likeness of the pledge and the chattel mortgage. In substance always, and in form often, these two contracts of security differ ; yet, when the form is the same, they are sometimes taken one for the other, and it is then for the courts a source of embarrassment and difficulty to distinguish between them. In point of substance they differ in this, that in case of the pledge, the general property or title remains in the pledgeor, and only a special property or lien passes to the pledgee ; and, in case of the chattel mortgage, the general property itself passes to the mortgagee, with a right of redemption remaining in the mortgageor. In the pledge, if the

debt is not paid at maturity, the creditor must foreclose and cause the thing pledged to be sold in order that he may be paid out of the proceeds ; but he does not become the owner of the thing for want of redemption by the pledgeor. In the mortgage, if the debt is not paid at maturity, the mortgagee becomes absolute owner of the thing mortgaged by the mere want of redemption by the mortgageor, subject, it is true, to the equity of redemption.

In point of form the two contracts differ in two particulars. In the pledge, no writing is necessary. The agreement is verbal, and may even be implied. In the mortgage, the contract must be in writing. In the pledge, possession must be transferred to the pledgee. In the mortgage, possession generally remains in the mortgageor.

When the pledge is in writing, or when by the mortgage possession is given to the mortgagee, the question often arises whether the contract is one of pledge or of mortgage, and the question is sometimes of difficult solution. The Court of Massachusetts has acknowledged the confusion and the difficulty when it said : "While the distinction between these two forms of security is well defined, yet, owing to the haste with which transactions are often made, and the meagreness or abbreviations of the written papers which accompany them, it is not easy always to determine what character is properly to be attributed to them."*

The confusion between the pledge and chattel mort-

* Thompson vs. Dolliver, 132 Mass. 104.

gage has produced a certain vagueness or looseness of language in relation to the two modes of security which has reached the courts of this country, and even the highest of them all, the Supreme Court of the United States. In a case in which that august tribunal passed upon a question of pledge, the organ of the court, one of its most distinguished members, said: "As the verbal mortgage or pledge included all the cattle, and was accompanied by a delivery, it was good, at least as against the defendants, irrespective of notice. The defendants were chosen as factors, they having before acted for the same parties in similar transactions, where drafts had been drawn on them against the shipments. They did not advance any money on account of this shipment, they parted with no interest, relinquished no legal right, and stood in no better position to dispute the validity of the mortgage or pledge than did Lyons himself."*

There seems to be in the mind of the eminent Justice some confusion whether the transaction at issue was a pledge or a chattel mortgage; or, more probably, he meant to use the words "verbal mortgage," as equivalent to "pledge," making the term *mortgage* a generic one for the modes of security depending upon personal property, but designating, in this instance particularly the pledge, inasmuch as the mortgage proper must be in writing, and can not be verbal. With all due respect, we doubt that the use of

* Means vs. Bank of Randall, 146 U. S. 628.

such language is warranted by the law of either pledge or mortgage.

The Civil law is free from such confusion or uncertainty in this respect ; first, because its law of pledge is better determined by statute ; and secondly, because it contains no chattel mortgage and allows the mortgage of immovable or real property only.

In a previous case arising under the law of Louisiana, where the Civil law is established, the same confusion of the pledge and mortgage appears in the judgment of the Supreme Court of the United States. The question was as to the validity of a pledge of commercial securities, which had remained, under certain circumstances, in the possession of the pledgeor. The court, in commenting upon the transfer of the collaterals, said : “ When, as in that case, the title has been transferred to the creditor, and the collections are made for his benefit, the pledgeor merely acting as his servant or agent in making them, the character of the security is not affected at the Common law by the debtor having actual possession of the collaterals. there being no fraud in the transaction. In such case they are held by the creditor *by way of mortgage as well as pledge* ; and a mortgage is valid notwithstanding the mortgageor has the possession. The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former and possession by the latter. Indeed possession may be considered as of the essence of a pledge (Pothier. Nantissement, 8) ; and if possession be once given up, the pledge, as such, is extinguished. The posses-

sion need not be actual; it may be constructive; as where the key of a warehouse containing pledged goods is delivered, or a bill of lading is assigned. In such case the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In such cases such constructive delivery can not be effected without doing what amounts to a transfer of the property also.

“The assignment of a bill of lading is of that kind. Such an assignment is necessary where a pledge is proposed in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such case *there is a union of two distinct forms of security—that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession.* This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their endorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge.” *

These remarks about the double security of pledge and mortgage, which we have underscored, are mere *obiter dicta*, it is true; but they are hardly at their proper place in a case governed by the Civil law, because the mortgage of chattels or personal property does not exist in the Civil law; and the commercial

* Casey vs. Cavaroe, 96 U. S. 477.

securities which formed the subject of the contention in that case, being personal property, constituted a pledge exclusively of a mortgage.

But we are disposed to doubt the correctness of the distinguished Justice's theory, even under the rules of the Common law, as to the union of the pledge and the mortgage resulting simply from the pledge of securities *transferred* to the creditor. A fundamental principle of the law of contract is, that the intention of the parties, if lawful, governs the agreement. That intention of the parties, in a word, is the law of the contract. When a debtor *pledges* commercial paper or other securities, and, *for the purpose of the pledge*, transfers them, either by endorsement, or delivery, or in any other way, to the creditor, he does not intend to mortgage them. He reserves all his rights under the pledge—the right to have his property returned to him if he pays the debt, or that it should be sold to pay the creditor, under the terms of the law or of the agreement; but he does not grant any right of mortgage to the creditor; the latter could not become absolute owner of the thing pledged by the mere failure of the debtor to redeem the pledge. In a word, the debtor has pledged, but not mortgaged, his property, whatever may be the *form* of the pledge. He has given to the creditor the single security of the pledge, but not the double security of pledge and mortgage. Could it be said that, in such a case of pledge, if the creditor abandoned the possession of the thing pledged, and thereby lost his rights upon it, he

would still retain his rights of mortgage over it, because, for the purpose of the mortgage, he need not have possession?

It is true that in the pledge of negotiable paper or other commercial securities, the debtor *transfers* them to the creditor, and the title thereby passes to the latter; but it only passes for the purpose of pledge, not of mortgage. In some States such transfer is provided for by statute as the mode and means of pledging that kind of property.

The title of the creditor in that case is only a *legal simulation*. The debtor does not in reality convey his property to him. The creditor is only an apparent owner. The ownership is still in the debtor after the transfer, as it is a constitutive element of the pledge that the pledgeor remains, during the existence of the pledge, the owner of the thing pledged. The principle is not the same in the case of a mortgage, at all events, of a mortgage at law, leaving aside the mortgage in equity. There, when the title passes to the creditor, the general property, which is the ownership itself, is in reality transferred to the creditor, subject to the defeasance which payment of the debt will or may produce. During the existence of the mortgage, the creditor is the real owner, under condition, of the thing mortgaged. He only forecloses the mortgage for the purpose of entering into possession of the property and defeating the equity of redemption.

We are speaking of the mortgage of the Common

law alone, for that of the Civil law transfers no title or general property to the creditor, and only gives him a lien or right of preference in the thing mortgaged, to be realized from the proceeds of the sale thereof by means of foreclosure.

It seems clear, in cases of pledge, that the union of the pledge and the mortgage can not be said to arise from the mere fact of a transfer of the securities to the creditor without the intention, expressed or implied, of the debtor that the mortgage should accompany the pledge. But we are inclined to think that even with the consent of the parties the pledge and the mortgage at law can not coexist in the same act; in other words, that the same property can not be pledged and mortgaged at the same time for the same debt to the same creditor, owing to the differences and incompatibility of the two contracts. The mortgage at law is a contract by which the debtor conveys his property to the creditor as security, it is true, but with the stipulation that in default of payment of the debt the creditor shall become absolute owner. The stipulation is of the very nature of the contract. But such stipulation would be null and void in the contract of pledge. Any clause by which the pledgee would become the owner of the pledge in default of payment is prohibited by the law. There is evidently some confusion and uncertainty in this subject of the pledge and mortgage being united in the same act and fused together by the transfer of the securities to the creditor; and there is nothing set-

tled or determined yet in that respect by the jurisprudence of the Common law, whatever may be the weight of authority of the *dicta* in the opinion of the case of *Casey vs. Cavaroc*.

In his recent work on bailments, Mr. Edwards expresses his views on this subject, in a sense adverse to the theory of the united pledge and mortgage. Speaking of the transfer of title of commercial securities, he says: "In respect to goods and chattels personal, this distinction is very plain; but there is a large class of cases where the contract still remains a pledge, notwithstanding the title is conveyed. Choses in action can not be otherwise delivered as a collateral security, and hence, as to these and such incorporeal property as can not be passed from one to another by delivery, the fact that the title passes does not, as has sometimes been held, create a mortgage. Whether the contract shall be held a mortgage or a pledge is not determined by that fact alone; the title must be conveyed in order to create a mortgage, but it is not a mortgage simply because the title is conveyed."*

These views coincide with the principles of the Civil law. Baudry-Lacantinerie, one of the more modern commentators of the Code Napoleon, says, in his recent work on Pledge, that the possession of an incorporeal thing or right, indispensable to the validity of a pledge, can only be effected by the transfer of the *title* to the pledgee; but that such transfer is only made by way of *guaranty*, and does not convey the

* Edwards on Bailments, Sec. 246.
Id., *Ibid.*, Secs. 219 and 220.

ownership or property of the thing. If it did the transaction would not be a pledge. The transfer of the ownership or property can only be effected by subsequent foreclosure of the pledge. And even when the parties adopt the form of the sale for the purpose of a pledge, the ownership is only *apparently* transferred. In reality, the title is only transferred for the purpose of securing the creditor, and the debtor remains, notwithstanding, the unqualified owner of the thing pledged, subject only to the lien of the former, which itself depends upon the fact of possession. There is no diversity of opinion in this respect among the Civilians.*

Another cause of the departure of the Common law from the original and fundamental principles of the contract of pledge may be found in the doctrine of the Equitable liens, peculiar to the jurisprudence of England and the United States, and unknown to the Civil law. In the latter no lien or privilege, as it is there termed, can be contracted for by the parties. It is created by statute, or it does not exist at all. The pledge only confers the lien and right of preference to the creditor if the contract is accompanied by possession of the thing pledged. The same indispensable condition of possession in the pledgee is part of the Common law; but there the equitable lien, without the possession, produces very nearly all the effects of the pledge and gives to the preferred creditor, to a

* Baudry-Lacantinerie, *Nantissement*, pp. 44, 45.
Troplong, *Nantissement*, Sec. 30.
Laurent, *Du Gage*, Sec. 288 *et seq.*

considerable extent at least, all the benefits and advantages of that contract, to the prejudice of the other creditors, by the mere intention of the parties that he should have a right of preference over some specific property of the debtor. In this respect all that equity jurisprudence has gained in favor of the equitable lien is detracted from the law of pledge. Where, under the inflexible rule of this law, that the pledgee should be in notorious and unequivocal possession of the property of his debtor, and thereby that third persons dealing with the latter should be informed of the encumbered condition of his property, by the principle of equitable liens, the third persons have no notice whatever of the right of preference given by him to some favored creditor, and they deal with him in the false belief that his property will answer for his debts generally and without a claim of priority over them. The equitable lien, therefore, works in the dark and arises from an occult understanding with the debtor, whilst the pledge must act in broad daylight, under pain of nullity.

This relation of the equitable lien to the law of pledge will be the subject of a special chapter in this book.

CHAPTER II.

NATURE AND SUBJECT MATTER OF THE PLEDGE.

What Things May Be Pledged.

1. All personal property, according to the Common law, and everything movable, according to the Civil law, corporeal or incorporeal, which is susceptible of alienation and of delivery, actual or symbolical, may be pledged. Not only tangible property and choses in action, but even mere rights are the subject of pledge, provided they may be delivered at least fictitiously or symbolically.*

2. But, as the ulterior object of the pledge is to enable the creditor to realize it by sale and receive the proceeds in payment of his claim, it is evident that what can not be sold does not ordinarily form the subject of a pledge. Such was the Roman law, as enunciated in the Digest. “*Eam rem quam quis emere non potest quia commercium ejus non est jure pignoris accipere non potest.*”†

The modern Civil law and the Common law agree in this respect.

* Code Napoleon, Art. 2075.
Civil Code of Louisiana, Arts. 3154, 3155.
Troplong, Nantissement, Sec. 261 *et seq.*
Story, on Bailments, Sec. 290.
Jones, on Pledges, Sec. 49.

† Digest, L. 1, Sec. 2.
Domat, Des Gages, Vol. 2, Sec. 19.

3. Yet, in some cases, a thing which the owner could not sell, might be given in pledge, to be used and retained by the pledgee until redeemed by the pledgeor. The creditor could not expect in that case to be paid from the proceeds of the sale, or to obtain by foreclosure the ownership of the pledge. But he could have the use and benefit of the thing pledged, if it were so stipulated in the contract, until the pledge were redeemed by payment of the debt.*

4. In the same manner, a thing which, by law, could not be seized or attached, might be given in pledge under the same stipulations.†

In France the "*rentes sur l'Etat*" (the interest on public funds), which can not be seized and sold, may be pledged.‡

5. The pledge is a contract by which a debtor delivers a thing to his creditor as security for the debt.§ And the pledge confers on the creditor the right to cause himself to be paid from the thing pledged, by privilege and preference over the other creditors.¶ Payment, therefore, from the proceeds of the pledge is ordinarily the object and the effect of that contract. But it need not necessarily be so. The mode and pro-

* Laurent, *Nantissement*, Vol. 28, Sec. 445.

Troplong, *Nantissement*, Sec. 52.

† Laurent, *Ibid.*, *supra*.

‡ Pont, *Des Petits Contrats*, Vol. 2, Sec. 1089.

F. Herman, *Code Civil*, Art. 2071, No. 14.

Laurent, *Nantissement*, Sec. 445.

§ *Code Napoleon*, Art. 2071.

Civil Code of Louisiana, Art. 3133.

Story, on *Bailments*, Sec. 286.

Jones, on *Pledges*, Sec. 1.

Code Napoleon, Art. 2073.

Civil Code of Louisiana, Art. 3157.

cess by which the debt is secured may be left to the choice of the parties. If the thing pledged could not be sold, the parties might contemplate in their agreement that the deprivation of his property by the debtor, and the possession and enjoyment of it by the creditor, if such enjoyment was permitted by the contract, would be a sufficient reason for the pledge; and the consequent inducement to the debtor to pay the debt might be considered as the means of security intended by the parties.

6. There is no limit in the Civil law to the duration of contracts of real securityship. As long as the debt secured is kept alive, such security, pledge or mortgage, may be kept alive also. The thing pledged may, therefore, remain indefinitely in the hands of the creditor, if the pledge is not redeemed. It may be so even when payment from the proceeds of sale is the object of the contract, because the creditor is not compelled to demand or effect the sale of the thing pledged.*

7. As the possession of the pledgee is *precarious*, and not exercised in the quality of owner, it follows that he never can, by the mere fact of his possession, acquire, through any lapse of time, the ownership of the thing pledged. And the converse, if it be so, of the rule is equally true, to-wit, that the debtor can not be released from the debt by any length of time, because the debtor, by not redeeming the pledge and leaving

* Laurent, Du Gage, Sec. 516.
Jones, on Pledges, Secs. 604 and 606.

it in the hands of the creditor, thereby acknowledges continuously the existence of the debt.* The two prescriptions, *acquirendi causa* and *liberandi causa*, are equally ineffective in the contract of pledge. Such is the rule of the Civil law, but it seems to be different in some of the Common law States, where the debt may be barred by the Statute of limitations, even whilst the pledge which secures it remains in the hands of the creditors.†

But we will consider this subject more at length later on.

8. Inasmuch as possession is the essential element of a pledge, what can not be delivered, either actually or constructively, can not be pledged, even if it can be sold.‡

Hence, it follows that though ordinarily nothing can be pledged that can not be sold, some things can be sold that can not be pledged, because delivery is not of the essence of sale, inasmuch as a thing may be legally sold and yet remain in the possession of the seller.

9. Money itself may be given in pledge. Instances of this are found in the deposits made with gas light

* Pont, Nantissement, Sec. 1163.

Laurent, Du Gage, Sec. 497.

Marcadé, Vol. 7, p. 205.

Conger vs. New Orleans, 32 La. An. 1253.

Blanc vs. Herzog, 23 La. An. 199.

Bank vs. Knapp, 22 La. An. 117.

† Jones, on Pledges, Secs. 581, 582 and 583.

Edwards, on Bailments, Sec. 249.

Hancock vs. Insurance Company, 114 Mass. 156.

Hulbert vs. Clark *et al.*, 128 N. Y. 295.

‡ Laurent, Droit Civil, Vol. 28, Secs. 444, 477.

Baudry-Lacantinerie, Nantissement, Vol. 1, p. 34, Sec. 75.

companies, public or circulating libraries, to secure the payment of their customers' accounts, or the return of the books borrowed; and in the *margins* deposited with brokers as security for the sums advanced by them.*

Could the creditor, in such a case, in default of payment, retain the money and thereby pay himself, without any legal proceedings and decree of court? On principle, the creditor could have no such right under the rule that any agreement which would authorize him to appropriate the pledge to himself, in case of non-payment of the debt, would be null and void; a rule which is common to the Civil law and to the Common law, as we will see hereafter.

10. It was doubtful in Pothier's time whether incorporeal things, such as credits or claims, could be pledged. The reason of the doubt was that, under the Roman law, incorporeal things could not be delivered and given possession of to the pledgee; hence could not be the subject of pledge.

11. Both in the Common law and in the Civil law of the present time the question has been solved in the sense that such rights and choses in action may be delivered symbolically or constructively, and therefore may be pledged. The principle has passed into legislation, in the Code Napoleon and in the Civil Code of Louisiana. The first provides simply that the pledge

* Civil Code of Louisiana, Art. 3154.
Pothier, Nantissement, No. 6.
Troplong, Nantissement, No. 55.
Story, on Bailments, Sec. 290.

of incorporeal things, such as claims, credits, etc., shall be made by an act in writing, authentic or private, recorded and notified to the debtor of the debt given in pledge.*

This act in writing is to be an act of pledge clearly, but in what form ?

The French commentators say that the act provided for in that article of the Napoleon Code is an act of *transfer* of the incorporeal rights, credits and so forth, and that the delivery and possession consist in the handing of the *title*, or muniment of title, of the rights or credits to the pledgee. The transfer of such rights and delivery of possession are provided for in both of the Codes. That of Louisiana, in two articles taken *verbatim* from that of France, provides that: "In the transfer of credits, rights or claims to a third person, the delivery takes place between the transferrer and the transferee by the giving of the title."

"The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferee may nevertheless become possessed by the acceptance of the transfer by the debtor in an authentic act." †

12. But, in providing for the pledge of such claims, the Code of Louisiana is more particular and precise

* Code Napoleon, Art. 2075.

† Civil Code of Louisiana, Arts. 2642, 2643; Code Napoleon, Arts. 1689, 1690.

than its great model, and leaves nothing on this point for interpretation or construction. It says: "When a debtor wishes to pawn a claim on another person, he must make a *transfer* of it in the act of pledge and deliver to the creditor to whom it is transferred the note or instrument which proves its existence, if it be under private signature, and must endorse it if it be negotiable." *

13. It is evident that the *transfer* in question is not one of ownership, for it would not constitute a pledge, but a transfer of the title only for the purpose of security or guaranty. This distinction between *the transfer in guaranty* for the purpose of a pledge, and *the transfer of ownership*, in case of a sale, is clearly shown by Professor Baudry-Lacantinerie, in commenting upon this subject.†

14. The Code of Louisiana, unlike the Code Napoleon, provides for the necessity of notifying the debtor of the claim, of the transfer or pledge. It enacts that: "When the thing given in pledge consists of a credit not negotiable, to enable the creditors to enjoy the privilege above mentioned, it is necessary not only that the proof of the pledge be made by an authentic act, or by an act under private signature, duly recorded, but that a copy of this act shall have been duly served on the debtor of the credit given in pledge." ‡

* Civil Code of Louisiana. Art. 3156.

† Baudry-Lacantinerie. Nantissement, p. 44.

‡ Civil Code of Louisiana, Art. 3160.

15. In the Civil law it is this notification of the transfer of the claim to the debtor of it which constitutes the legal possession of the claim by the transferee, whether in case of the sale, pledge, garnishment, attachment, or seizure under execution. The right of such transferee, or attaching or seizing creditor, springs from this notice to the debtor of the claims.*

In the case of a sale, the incorporeal thing or credit sold is only put in the possession of the vendee by such notice to the debtor of the claim, and until the notice has been given the claim can be seized as property of the creditor of the claim. In case of the pledge of such credit, the lien, or privilege, or right of preference of the pledgee, is only effected by the notice. In case of attachment, garnishment or seizure under execution, the same lien or privilege, or right of preference of the attaching or seizing creditor is obtained also by means of the said notice, and only by means of the notice. This important principle rests upon the fact that the right of preference in question depends upon the transfer or delivery of possession, and that the notice to the debtor of the credit is made by law constructive possession of the credit.

16. Troplong, in his usual happy mode of expression, states the principle in these words: "It is this notice which informs the debtor of the privilege of the creditor. It is it which binds the debtor to the pledgee. It constitutes the mode of taking of possession

* Troplong. Nantissement, Secs. 251 *et seq.*

proper to the transfer of incorporeal movable things. For it has always been a rule of the French law that the transfer itself gives no possession, and that it is by the notice that the creditor takes external possession of his right.'*'

17. But the notice of the transfer is only necessary to establish the right of preference of the transferee over third persons and creditors of the transferrer, as shown by the articles of the Napoleon Code and Code of Louisiana. Between the vendor and vendee, and pledgeor and pledgee, such notice is not necessary and the sale or pledge of the incorporeal right, or credit, is valid and binding upon the vendor and pledgeor without it. Clearly the vendor and pledgeor need not be informed by notice of their own act, and they are bound to their vendee and pledgee by the contract of sale or pledge itself.

18. In the Common law the transfer of incorporeal things, for the purpose of a pledge, and for putting the pledgee in possession, is made also by transferring or transmitting the title, or muniment of title, of the claim, credit, or other incorporeal thing or right; but no notice to the debtor of the credit is required to secure the right of the pledgee against third persons or other creditors. The mere act of the transfer

* Troplong, *Nantissement*, Sec. 265.

Troplong, *De la Vente*, Vol. 2, Secs. 882, 883.

Pont, *Nantissement*, Secs. 1108, 1109.

Baudry-Lacantinerie, *Du Gage*, Secs. 57, 58, 59.

Laurent, *Du Gage*, Sec. 463.

Hanna vs. Bry, 5 La. An. 656.

Monticon vs. Mullen, 12 La. An. 275.

St. Romes vs. Cotton Press Co., 21 La. An. 291.

of the claims and muniment of title complete the pledge.

19. Jones, on Pledges, in this respect, says: "The assignment of a chose in action as security is valid, without notice to the debtor of the assignment. The assignment is complete upon the mutual assent of the parties to it, followed by a delivery; and it does not gain additional validity as against third persons by notice to the debtor."*

Judge Story, and Mr. Edwards in his book on Bailments, both speak of the pledge of incorporeal things by transfer to the pledgee; but make no mention of the question of notice to the debtor of the credit.†

20. The subject, from its Common law view, was fully discussed by the Court of New York, which said: "It was not needful to make the assignment or lien valid and effectual against Heath and against his attacking creditors, that notice thereof should have been given to the debtors, the Ingersolls. Such notice was needful only to defeat a subsequent *bona fide* payment by the Ingersolls. It has been held in some of the States, and was formerly supposed to be the rule in England, that such an assignment could be valid and operative only in case of and after notice to the debtors. It was held in Watts vs. Porter (3 E. and B. 743) that an assignment of a mere chose in action without notice to the debtor was imperative as

* Jones, on Pledges. Sec. 136.

† Story, on Bailments. Sec. 290.

Edwards, on Bailments, p. 191.

Thayer vs. Daniels. 113 Mass. 129.

against a subsequent judgment debtor. But the Lord Chancellor and Lords Justices Knight, Bruce and Turner, in *Beaman vs. Earl of Oxford* (6 De G. M. and G. 492), and the master of the rolls, in *Kinderley vs. Jervis* (22 Bear. 1), held a contrary doctrine; and in *Dickering vs. the Ilfracombe Railway Co.* (L. R. 3, C. P. 235), *Bovill, Ch. J.*, and *Willes, J.*, agreed with the latter authorities. Still later, in *Robinson vs. Nesbitt* (L. R. 3, C. P. 264), the case of *Watts vs. Porter* was directly overruled, and it was held that a prior equitable assignment of railway shares in the hands of a garnishee was a bar to an attachment, notwithstanding that no notice of such assignment had been given to the garnishee. In *Stevens vs. Stevens* (1 Ashmead, 190), it was held that the assignment of a debt due by a third person was a good equitable transfer of such a debt as against a subsequent attaching creditor, notwithstanding no notice of such assignment was given to the debtor until after the attachment. In *United States vs. Vaughan* (3 Binney, 394), a similar decision was made, and it was further held that the plaintiff in a foreign attachment stands upon no better footing as to the thing attached than his debtor, the defendant in the attachment. In *Dix vs. Cobb* (4 Mass. 508), *Parsons, C. J.*, said: "Although the trustee in this case had no notice of the assignment until after he was sued as trustee, yet immediately on the assignment the equitable interest in the debt, as between the parties to it, immediately passed to the assignee. And

if the assignor had afterward recovered the debt, he would be obliged to pay it over to the assignee. But an attaching creditor can not stand on a better footing than his debtor (if the assignment be not fraudulent as to creditors), and if he attaches any property of his debtor, it must be attached subject to all lawfully existing liens created by his debtor. And consequently, if his debtor has no equitable interest in a *chose in action*, the creditor can not acquire any by his attachment." In *Muir vs. Schenck* (3 Hill, 228), it was held that, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he has given no notice to either the subsequent assignees or the debtor, and the question between a previous assignee and a subsequent attaching creditor was considered the same in principle as that between conflicting assignees. However much that case may have been criticised elsewhere, it has been considered well decided in this State. It was cited with approval in *Greentree vs. Rosenstock* (61 N. Y. 583), and *Freund vs. The Imp. & Tr. Nat. Bank* (76 *Id.* 352).''*

21. We must bear in mind, in considering the subject of the pledge of incorporeal things, that it is only the *movable* incorporeal things that can be pledged. And, in case of the pledge of an *immovable* incorporeal thing, the pledgeor himself, beside his creditors, can demand the nullity of the contract. The principle is not the same as in the case of a pledge

* *Williams et al. vs. Ingersoll et al.*, 89 N. Y. 522 and 523.

given without a written act, which is binding on the pledgeor, though not upon third persons. The pledge of immovable property being no pledge at all, can not bind the parties.

This was decided by the French courts.*

22. Troplong, speaking of the article of the Napoleon Code which provides that incorporeal things may be pledged, says: "Our article 2075 only covers the pledge of incorporeal *movables*. It follows hence that if the debtor gave the creditor a real right in pledge, the latter would obtain no privilege." †

Troplong seems to be the only one of the French commentators whose attention has been drawn to this point; but he himself should have distinguished between real rights which are movable and those which are immovable. A movable real right may clearly be the subject of a pledge.

Demolombe says: "Real rights can therefore be movable as well as immovable. In the same manner that personal rights can be immovable as well as movable. Pothier, *Introduit. Génér. aux Cont.*, Nos. 110, 112 *et* 119." ‡

The usufruct of real estate, for instance, being an incorporeal immovable, could not be pledged; whilst the usufruct of personal property or movables, may perfectly well be the subject of a pledge.§

* Dalloz, 36, 2, 76.

† Troplong, *Du Gage*, Sec. 295.

‡ Demolombe, *Distinction des Biens*, Vol. 1, Sec. 465.

§ Civil Code of Louisiana, Art. 471.

Code Napoleon, Art. 526.

24. On this subject we must distinguish between the pledge of the usufruct of property and the pledge of the property itself. Let us take for instance the case of the pledge of corporate stock. The pledgee may have the stock itself sold to satisfy his debt. But in the case of the pledge of the usufruct of the same stock, the pledgee can have the usufruct sold for the same purpose; but he can not reach the stock itself. Upon that he has no right, because it is not the stock which is pledged, but the mere usufruct of it.

In the same manner the usufruct of real estate may be mortgaged, in the Civil law, because it is an incorporeal immovable; but the mortgagee, in that case, could only foreclose upon the usufruct itself and have it seized and sold; but he could not reach the real estate by virtue of his mortgage.

CHAPTER III.

THINGS IN EXPECTANCY, OR WHICH HAVE A MERE POTENTIAL EXISTENCE.

25. Such things can not be pledged, though they may be sold, as animals yet unborn, fish yet uncaught, crops yet ungrown, etc.*

These principles govern both the Civil law and the Common law.†

Yet, when animals are given in pledge, their young born during the pledge form part of it, though they were not in existence when the contract was entered into. But this is the effect of the principle that the fruits of the thing pledged become part of the pledge.‡

26. A case arose in Louisiana, in which there was a written agreement between a planter and his commission merchant, the former *pledging* his growing crop to the latter as security for his advances. The Court held that the crop in expectancy could not be delivered at the movement of the pledge, and, therefore, could not be pledged.

* Civil Code of Louisiana, Arts. 2450-2451.

Troplong, *Vente*, Vol. I, Sec. 203.

Baudry-Lacantinerie, *Nantissement*, Sec. 36.

† Tiedeman, on Sales, Sec. 52.

Benjamin, on Sales, Sec. 78.

‡ Pont, *Des Petits Contrats*, Vol. II, Sec. 1080.

Baudry-Lacantinerie, *Nantissement*, Sec. 96.

Jones, on Pledges, Sec. 32.

Schouler, on Bailments, Sec. 200.

Story, on Bailments, Sec. 292.

The Court said: "Property in expectancy may be the object of a contract of sale, because that contract is complete by the mere consent of the parties. But it can not be the subject of a contract of pledge, because that contract is what the civilians call a real contract; one which is not perfected by the consent of the parties, but which requires the delivery of the thing pledged."*

27. This case was decided under the legislation of Louisiana as it then stood, and under the general principles of the law of pledge; but subsequently an act of the Legislature of that State was passed to enable the planters to pledge their *growing* crops in favor of their commission merchants, to secure advances of money, *as if the pledgees were in possession of the crops*. The formalities necessary for such pledge consist in a written agreement of pledge and the recording of the same in the office of Mortgages of the parish or county, where the crops are raised.† This is a pledge *sui generis*, created by special law and, therefore, taken out of the general principles which prescribe that no pledge is valid without actual possession.

28. As delivery, and thereby possession, to the pledgee, is of the essence of the contract of pledge, it is evident that property *in futuro*, or which has only a potential existence, can not be pledged, because it can not be delivered.‡ It is, therefore, curious to

* Hagan vs. Sompayrac, 3 La. 154.

† Acts of the Legislature of Louisiana, of the year 1874, p. 114.

‡ Pont, Nantissement, Sec. 1080.

Baudry-Lacantinerie, Nantissement, Sec. 36.

Troplong, Nantissement, Sec. 296.

Laurent, Du Gage, Sec. 469 *et seq.*

F. Herman, Code Civil, Art. 2073, No. 39.

observe the error into which a law writer of such high authority as Judge Story has fallen on that subject in respect to the Civil law. In his commentaries on Bailments, Chapter V, on Pawns or Pledges, Sec. 294, he says :

“ In the Civil law, not only property, of which the party was at the time in possession, or to which he had then a present title, might be pledged ; but property, of which he had neither possession nor title, and which should be acquired by him *in futuro*. And when the title was so acquired *in futuro* the right of the pledgee attached immediately upon it. But, in such cases, it was more properly an hypothecation than a pledge. In our law a pledge is strictly confined to property, of which there may be a present possession or title, or in which there is a present vested right.” And Judge Story cites Domat and the Digest in support of this extraordinary statement, or rather he finds in Domat a note of the law of the Digest on this point.

29. But Domat does not say so, nor does the Digest. The passages in both of them cited by Judge Story apply to the mortgage, and not to the pledge, of future property. By the Roman law, by the French law, by the Civil law, as well as by the Common law, property may be mortgaged by a person who has only an expectant title and the mortgage will attach when the title vests in the mortgageor. And it is so of the mortgage, because possession in the mortgagee is not necessary.

The words of Domat, as we find them in Cushing's Edition, are as follows :

"Mortgage on an Estate to Come.—Those who bind themselves by any engagement whatsoever may, for the security of their performance of the engagement on their part, appropriate and mortgage, not only the estate they are masters of at the time of contracting, but likewise all the estate which they shall be afterward seized or possessed of. And this mortgage extends to all the things which they shall afterward acquire that are capable of being mortgaged by what title soever it may be that they acquire them, and even to those which are not in being when the obligation is contracted ; so that the fruits which shall grow upon the lands will be comprehended in the mortgage of an estate to come." *

30. The words of Domat, in the text, are : "Ceux qui s'obligent à quelque engagement que ce puisse être, peuvent y affecter et hypothéquer, non seulement leurs biens présents, mais encore tous leurs biens à venir ; ce qui s'étend à toutes les choses qu'on pourra acquérir dans la suite, qui seront susceptibles de l'hypothèque, à quelque titre qu'on puisse les acquérir, et à celles même qui ne sont pas encore en nature quand on s'oblige ; ainsi les fruits qui pourront naître des héritages, seront compris dans l'hypothèque des biens à venir." †

31. The words of the Digest in the paragraph cited by Domat and by Judge Story are as follows :

* Domat, Cushing's Ed., p. 649, No. 1661.

† Domat, Vol. 2. Gages et Hypoth. No. 5.

“Et quæ nondum sunt futura tamen sunt *hypothecæ* dari possunt; ut fructus pendentes, partus ancillos, fœtus pecorum et ea quæ nascuntur sint hypothecæ obligata.” *

There is no mention of the pledge in either place, but of the mortgage.

It is true that the pledge and the mortgage of the Roman law, as we have seen before, were for a time confounded together in many respects, but when the Digest was compiled in the sixth century of the Christian era the Roman law had reached that high degree of perfection which has not been surpassed by modern legislation, and the distinction between the two modes of real securities was well established.

32. The great commentator of the Napoleon Code, Troplong, who, perhaps, among the brilliant array of those admirable French expounders of the Civil law, has written the best and most complete treatise on Pledge, says in that respect :

“L’hypothèque entra donc dans la jurisprudence romaine sous son nom grec. Variété du *pignus*, elle différait cependant du *pignus* proprement dit, en ce que le *pignus* était livré au créancier, tandis que la chose hypothéquée restait aux mains du débiteur.” And he cites the Roman juriconsult Ulpian, whose words are consecrated in the Digest : “Proprie pignus decimus quod ad creditorem transit; hypothecam cum non transit nec possessio ad creditorem.” †

* Digest, L. 1, *De pign. et hyp.*

† Troplong, *Du Nantissement*, p. 14.

33. Troplong explains also the apparent confusion of the Roman law on the similarity of the mortgage and the pledge alluded to by the jurisconsult Marcianus in the words: *Inter pignus et hypothecam tantum nominis sonus differt*. The French commentator says of this maxim: "This proposition is only true in a restricted sense, and that is, only so far as the mortgage and the pledge belonged to the subject of real securities. But, in other respects, the mortgage differed considerably from the pledge; and it differed from it, not only by the name, but also, and especially, because it left to the debtor the possession which the pledge took away from him."*

34. Domat himself indicates clearly the difference between the mortgage and the pledge, in the French law, and consequently that his words on the mortgage of property *in futuro* do not apply to the pledge.

He says in his Art. I: "But the word *pawn* is more properly applied to movable things, which are put into the hands and keeping of the creditor; and the word *mortgage* signifies properly the right acquired by the creditor upon the immovables which are appropriated to him by his debtor, although he be not put into possession of them."

Indeed, as possession is the essential and indispensable condition of the pledge in the Civil law as well as in the Common law, it is impossible to conceive how property not yet in existence, and, therefore, not susceptible of delivery, can be pledged.

* Troplong. Nantissement, page 9.

35. The mistake of Judge Story is, therefore, hardly justifiable, and would lead the law student into a grave error. But the notions of Judge Story on the subject of the pledge of the Civil law are frequently found to be erroneous, and he is evidently not the safe guide in such matters that he is in the Common law. For instance, he says, also: "There are few cases, if any, in our law, where an hypothecation, in the strict sense of the Civil law, exists; that is, a pledge without possession by the pledgee.

"In the Civil law, although a delivery of the thing took place in cases of strict pledge, *pignus*, yet, as has been already stated, in the case of an hypothecation, no such delivery or possession was necessary. An hypothecation had a complete effect to transfer and vest a title in the thing, if that was the intention of the parties upon the mere execution of the contract, although no possession was given, or it was even stipulated not to be given." *

36. The statement of the great American jurist on this subject is not sufficiently precise. What he says here of the Civil law, meaning the Roman law, is only true of the antiquities of the Roman law, when, by the *mancipatio per res et libram*, accompanied by the *fiducia*, the contract of security took the form of a sale, transferring the property of the thing conditionally to the creditor, under a promise from him to return it to the debtor on payment of the obligation. This was a kind of sale with the right of redemption,

* Story, Bailments, Secs. 288, 298.

strongly resembling the mortgage of the Common law. But this primitive contract of security had disappeared when the Roman law reached its high degree of improvement, and was replaced by the *pignus* and the *hypotheca*, in neither of which the title of the thing pledged or mortgaged was transferred, even conditionally, to the creditor. The theory of the legal title, or qualified property, transferred to the mortgagee, or pledgee, under condition, is a theory of the Common law, and is contrary and repulsive to the Civil law.*

37. Without desiring to constitute myself a critic of Judge Story's views of the Civil law, as the object of this book is to help the student to understand its principles in the contract of pledge, I am constrained to notice another of his grave errors. He says of the pledge of incorporeal things: "But in the Civil law, and French law, Pothier seems to think that incorporeal things, such as choses in action, are not deemed to be strictly capable of being conveyed in pledge. However, they are capable by assignment of being effectively used for the same purpose. And it may perhaps be doubted if Pothier's opinion is sustained by the Civil law in its full extent." †

We must observe, first, that Pothier *does not seem to think*, but says positively that incorporeal things can not be pledged because they can not be delivered to the pledgee. "In regard to incorporeal things, such as credits, they are not susceptible of being

* Troplong. Nantissement, Sec. 5.

Ortolan. Instituts, p. 205 and p. 1117.

† Story. Bailments, Sec. 290.

pledged because they can not be delivered, which is of the essence of this contract.” *

But in the very note to this paragraph, both of which are cited by Judge Story, Pothier says that since the publication of his book he has been informed that the French jurisprudence has been changed on the subject, and that the pledge of incorporeal things has been recognized as valid by the court.

Whatever the French law was in Pothier's time, the Code Napoleon, promulgated in 1803 and 1804, provided specifically for the pledge of incorporeal things, and when Judge Story wrote his book, in 1832, he had every means of enlightenment on the subject.†

38. It would seem that the remark on his want of sufficient precision on the subject of the Roman law of pledge, made by an English writer, is not unmerited. Sir William Markby says of him: “As to the Roman law of pledge, at any rate, Story's knowledge appears to me to be incomplete.” ‡

This author states, which is very true, that Judge Story relies chiefly in questions of Roman law upon Domat and Pothier, but that the labors of these great men have been long ago eclipsed by later discoveries.

* Pothier, Nantissement, Sec. 6.

† Code Napoleon, Art. 2075.

‡ Elements of Law, p. 214, Sec. 435.

CHAPTER IV.

39. In the modern Civil law there can be no confusion of the mortgage and the pledge, as the mortgage never applies to personal property. But there is still evidently some confusion on that subject in the Common law, and the proof of it lies in the fact that the courts of the Common law States are frequently called upon to decide whether a contract of security between creditor and debtor is a mortgage or a pledge.

The confusion between the two contracts has been the subject of remarks by the Courts and the text writers.*

40. In a recent case, to which we alluded in our Introduction, the Supreme Court of the United States, passing upon a contract of that sort, said :

“As the verbal mortgage or pledge included all the cattle, and was accompanied by delivery, it was good, at least as against the defendants, irrespective of any question of notice.” †

Does the Court mean to say that a verbal mortgage or a pledge is the same thing? Can there be a verbal mortgage? Or is it that, in that case, it was doubtful whether the contract was a chattel mortgage or a pledge?

* Thompson vs. Dolliver, 132 Mass. 103.

Jones, on Pledges, Sec. 4.

Ante, p. 12.

† Means vs. Bank of Randall, 146 U. S. 628.

Ante, p. 13.

In the Civil law, such uncertainty in the language of the Court would be subject to criticism.

41. There is in respect of the pledge of future property no difference between the Civil law and the Common law, inasmuch as under both systems, delivery of the pledge to the pledgee is a condition *sine qua non* of the validity of the pledge. There may be in some cases an agreement to pledge future property, which becomes effective whenever the property rises into actual existence; but there is in such cases no pledge at the moment the contract is formed, because no delivery is then possible, even fictitiously. There is in such cases a promise of pledge, which may be enforced by action, but there is no pledge, and, therefore, no security resulting from it.*

42. Legislation may, of course, create certain pledges *sui generis*, by virtue of which future property may be pledged, such as the laws of some agricultural States which provide that the crop of a farm or plantation, even before rising into existence, may be pledged to secure loans of money or supplies used in making the crop. Such cases are taken by special laws out of the general principle of the law of pledge.† Such special pledges do not change the rules governing contracts of pledge generally.

43. It is true that the debtor may pledge property which does not belong to him, if he can deliver it at

* Laurent, Vol. 28, p. 464.

Jones, on Pledges, Secs. 28 and 29.

D'Meza's Succession, 26 La. An. 35.

Baudry-Lacantinerie, Nantissement, Sec. 36.

† *Ante*, p. 38. Hagan vs. Sompayrac, 3 La. 154.

the moment of the pledge, and the agreement will become final, and the right of the pledgee will attach retroactively at that time, if thereafter the pledgeor becomes the owner of the property; but this rests on a different principle, and depends upon the rules of estoppel, which will not allow the pledgeor to deny his obligation and his declaration that the property belonged to him. The same doctrine applies to the mortgageor of property, which at the time of the mortgage did not belong to him.

44. The true owner in such cases, if he has not consented to the pledge or mortgage of his property, and third persons, if they are thereby injured, may attack the validity of the transaction, but until they do, the pledgee or mortgagee may have the benefit of it, and is safe from any denial of ownership by the pledgeor or mortgageor.*

45. But such is not the law in France and the countries of continental Europe which have followed her legislation. There, under the principle that the possession of personal property is equivalent to title, the pledgee in good faith can not be disturbed even by the true owner of property fraudulently disposed of. This feature of the French law of pledge will be the subject of another chapter.

CAN RIGHTS OF INHERITANCE BE PLEDGED?

46. We must first distinguish between the rights of an heir which have already accrued by the death

* Civil Code of Louisiana, Arts. 3144 and 3304
Jones, on Pledges, Sec. 52.

of the ancestor, relation or testator, and the mere expectant and eventual rights of a presumptive heir before the death of the ancestor, relation or testator.

By the Civil law the heir can not dispose by contract of his expectant rights of inheritance whilst the ancestor, relation or testator is alive, even with his consent. The prohibition is based upon reasons of morality and public policy, and consequently all such contracts of the heir, whether by sale, exchange, lease or pledge, are invalid and of absolute nullity.

“There are things,” says Pothier, “which it is against decency and good morals to expect, such as a future succession, which one can not expect without hoping for the death of the person that will realize the expectation, which morality does not permit.” *

A guilty hope might suggest criminal thoughts. Such agreements are, therefore, contrary not only to good morals but also to public order. The Court of Cassation so held: “The agreement by which the eventual rights of an heir in the succession of a living person are the subject of a bargain, being prohibited by the Arts. 791, 1130 and 1600 of the Civil Code, must *necessarily* be placed among the contracts which are contrary to good morals and public order.” †

This principle comes from the Roman law, but the modern Civil law has rendered the rule even more

* Pothier, Des Obligations. Sec. 132; De la Vente Sec 527

† Dalloz, 1846, 1, 25.

Laurent, Des Obligations. Sec. 84.

Troplong, De la Vente. Vol. I, Sec. 246.

Toullier, Droit Civil, Vol. 6, Sec. 115 *et seq.*

Duranton, Droit Civil, Vol. 10, Sees. 310-311

Marcadé, De la Vente, Vol. 6, p. 211.

rigid. By the Roman law the prohibition was only applied to contracts of the kind entered into by the contracting parties without the consent of the person whose succession was the subject of the contract. With the consent of that person the law did not forbid the agreement.*

47. The Code Napoleon and the Civil Code of Louisiana prohibit such stipulations even in the contract of marriage, the most favored of all contracts under the Civil law. †

By the Civil law, therefore, it is clear that rights of inheritance can not be the subject of the contract of pledge when such rights have not yet accrued to the heir by the death of the ancestor or testator.

48. It is not so in the Common law. Here the two great systems of law of the civilized world differ, where they seldom do, in the fundamental principles of morality and public order. The right of the expectant or presumptive heir to dispose by contract of his eventual rights in the estate of his ancestor, whilst this one is yet alive, has been recognized and sanctioned by the courts of England and of this country; and that jurisprudence has been firmly established by numerous authorities of the highest order. The question of good morals and public policy has not even been raised or considered in the cases in which the principle has been declared. The subject has been examined by the courts simply as a matter of the suf-

* L. 30, C., De Pactis; Laurent, *loc. cit.*

† Code Napoleon, Arts. 791, 1130 and 1600.

Civil Code of Louisiana, Arts. 979, 1015, 1887, 2327, 2454.

iciency of interest in the heir to form the consideration of a contract, and for a court of equity to enforce it.

49. Judge Story says in this respect: "So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement, and in such case, if made *bona fide* for a valuable consideration, it will be enforced in equity after the death of the ancestor—not, indeed, as a trust attaching to the estate, but as a right of contract." *

In Spence's Equity Jurisprudence, the same doctrine is stated in the following manner: "A naked possibility or expectancy of an heir to his ancestor's estate, or even of the anticipated right of a person or next of kin, may be the subject of a contract in equity which will be equivalent to an assignment of the property, if, and when, into possession." †

Modern English statutes, as well as the American legislation, have changed the Common law so as to permit the assignment *at law* of contingent and future interests, expectancies and possibilities, coupled with an interest, in many cases, either of real estate or of personal property. But the jurisdiction of equity continues to be exclusive over all other assignments of contingent, future, expectant interests and possibilities not embraced within the statutes. ‡

* Story, Eq. Jurisp. Vol. 2. Sec. 1040.

† Spence, Eq. Jurisp., Vol. 2. p. 865.

‡ Pomroy, Eq. Jurisp., Vol. 3, Sec. 1285 *et seq.*

Fonblanque, Equity, p. 213.

Hobson vs. Trevor, 2 Peere Williams, 191.

Miller vs. Emans, 19 N. Y. 384.

50. Such being the Common law, can the expectant rights of an heir be pledged? It is evident that, strictly speaking, they can not be, inasmuch as possession of the thing pledged could not be transferred to the pledgee. But all the effects of a pledge might be given to contracts in which an heir, to secure his debt, would give to the creditor a power of attorney, irrevocable and coupled with an interest, to ask, demand, sue for and recover all such interest, estate, property and effects, real and personal, as he then, or at any time thereafter, might have or claim as heir at law, devisee, legatee or next of kin of his father, and apply the same to the payment of the debt.

51. In such a case, the Supreme Court of New York, not only recognized the validity of the agreement, but decided that the right of the creditor thus secured was paramount to that of another creditor of the same debtor who attached after the death of the father the property inherited by him. The court rested its judgment entirely upon the validity of the assignment made by the debtor of his expectant rights as an heir. *

52. As to the rights of inheritance already accrued by the death of the ancestor or testator, it was decided in France by the Court of Cassation that they could legally be pledged, provided the estate was composed exclusively of movable or personal property, inasmuch as only such property can be pledged; and provided further, that the rights of the heir were evidenced by

* *Stover vs. Eycleshimer*, 46 Barb. 84.

a title susceptible of delivery, inasmuch as incorporeal things to which no title is attached, and which, therefore, can not be delivered, can not be the subject of a pledge. In the case in question the rights of inheritance of the heir were his undivided share in the estate.*

53. Pothier, after saying that it is only movable property which ordinarily is the object of the contract of pledge, adds: "However, inheritances may also be the object of this contract. It is what takes place when the creditor is put in possession of an estate, in order that he should receive the fruits in payment of his claim. And he cites both the Digest and the Code of the Roman law, where the same provisions are to be found.† We should note that this is the case of an *Antichresis*, which is the pledge of real estate or immovable property, a mode of security borrowed by the Romans from the Greeks, and which exists also in modern Civil law, though not frequently resorted to at the present day. The principal reason of the unpopularity of the *antichresis* is, that the creditor in possession of real estate for the sole purpose of recovering his debt from the fruits, and only for a limited time, is not likely to take the same care of it and to improve it as the owner himself would do.‡

54. In Louisiana the point does not seem to be

* Court of Cassation, Sirey. 94, 1, 273.

Baudry-Lacantinerie, Nantissement. Sec. 34.

† Pothier, Nantissement, Sec. 5.

Pothier, Nantissement, Sec. 20.

‡ Laurent, Nantissement, Sec. 445.

Code Napoleon, Art. 2085.

Civil Code of Louisiana, Art. 6.

Troplong, Nantissement, Sec. 495 *et seq.*

Laurent, Nantissement. Sec. 527 *et seq.*

established one way or the other. In a case in which the heir of an estate, for the purpose of securing his creditor, did, by written agreement, transfer, sell and assign to him all his rights, title and interest in the estate, the Court held that the transaction could not be a sale, because no price was fixed, and the price is an essential element of the sale; and that it could not be a pledge, because delivery could not be made, nor possession given, of the hereditary rights.*

In a previous case, in which succession rights were transferred by an heir, in the same manner, to his creditor, in order to *secure* him, the same Court held that the transaction was a pledge, but that it could produce no effect *quoad* third persons and other creditors, because it was not recorded as required by law.†

This may be considered as implying that rights of inheritance can be pledged if the act of pledge is properly recorded. The question is, therefore, not settled in the jurisprudence of Louisiana. But, as in that State, it is clear that incorporeal things may be the subject of a pledge, provided a symbolical or constructive delivery may be made, it is difficult to perceive why rights of inheritance in an estate composed exclusively of movable property, should not be pledged if the title to such rights is susceptible of delivery, as was decided by the Court of Cassation in the case alluded to above

55. Under the principles of the Common law the pledge of rights of inheritance is more easily estab-

* Forbes vs. Burke, 24 La. An. 85.

† Succession of Argoté, 3 La. An. 477.

lished. In a recent case decided by the court of Pennsylvania, it was held that the assignment by deed poll, made by a son to his father's executors, of all his interest in the estate to secure his debt to the estate, was a valid pledge, though it would not be as an assignment, for want of registry. The estate was composed both of real and personal property. The court said that so far as the interest pledged was personalty, it was a valid and effective assignment. But so far as the interest of the heir was realty, the question was not decided and was deferred to subsequent proceedings before the master in chancery and the court below. It is remarkable, at the same time, that a doubt is raised in the opinion of the court whether the interest in the realty is separable at all from the blended interest. We may, then, ask, if it is not separable, whether the pledge is still valid upon a compound of personalty and realty. *

CAN A LEASE OF REAL ESTATE BE PLEDGED BY THE LESSEE ?

56. It seems that this question should be answered in the affirmative.

Under the Common Law authorities the validity of such a pledge by assignment of the rights of the lease and delivery of the act of lease to the pledgee has often been recognized.†

* Handy's Estate, Larned Appeal, 167 Pa. St. 552.

† Penney vs. Lynn, 59 N. W. 1043, Minn.

Am. Digest, 1895, p. 3739.

Am. Digest, 1894, p. 3750.

Am. Digest, 1893, p. 4022.

But can it be done in the form of a contract of pledge proper—that is, by delivery of the lease to the pledgee?

The Court of Louisiana decided that it could not be done, and hints in the decision that the only manner in which the lessee can effectually pledge the lease is by making a transfer of it to the pledgee and notifying the lessor.*

57. The question has presented itself before the courts in France. The court of the first instance there held that, placing the lease in the hands of the pledgee, under the terms of a written act of pledge, and notifying the lessor, constituted a valid pledge of the lease, though possession of the leased premises was not given to the pledgee. The Court considered that giving possession of the real estate to the pledgee (unless it was by the *antichresis*, which the lessee could not do) would be no pledge, as this contract only applied to movable or personal property. But the Court thought that the right to occupy the leased premises was an incorporeal thing, susceptible of being pledged, and delivering possession of the title or evidence of that right, to-wit: the act of lease, was, on that point, a sufficient compliance with the law, which provides that possession of incorporeal things may be fictitious or symbolical.

The Court of Appeals reversed the decision on the ground that there could be no pledge of the lease without possession of the leased premises. But the

* Coffin vs. Kirevan, 7 La. An. 221.

Court of Cassation affirmed the judgment of the court of first instance, fixing the jurisprudence of France upon this question, that a lease of real estate may be pledged by the lessee by an act of pledge proper.*

58. Pont expresses a positive opinion on this subject and says: "As a general rule, it can not be doubted that a lease may be the subject of a pledge. Notwithstanding the lively discussions which have taken place about the nature of the lessee's right, it can no longer be contended that it is not a movable right. At the same time that he is the debtor of the rent, which makes the lessor the creditor of it, the lessee has clearly a right of use. That right is then, under the terms of Arts. 2072 and 2075, a movable right,—of which the lessee is the creditor. It may, consequently, be the object of the contract of pledge; and this point (if not the one which relates to the delivery necessary to make the contract valid as to third persons) has been admitted without difficulty by jurisprudence." †

Laurent, the great Civilian, reasons upon this subject with his usual clearness and force, and approves the doctrine established by the Court of Cassation, that a lease may be pledged.‡

59. But, *quære*: If in the act of lease it were expressly stipulated, as is generally the case in some States, that the lessee shall not have the right of either

* Dalloz, 1859, I, 167.

Sirey, 59 I, 913.

† Pont, Des Petits Contrats, Vol. 2, Sec. 1103.

‡ Laurent, Droit Civil, Vol. 28, Sec. 461.

Baudry-Lacantinerie, Nantissement, p. 19, Sec. 361

subleasing the property or transferring the lease, could he pledge it? It would seem not, for the pledge, if foreclosed, would lead to the sale of the lease, or at least to the sale of the right of occupation of the leased premises; and the lessee would have done thereby indirectly, in violation of the terms and conditions of the lease, what he could not do directly.

CAN THE LESSOR PLEDGE THE RENT OF THE LEASED PROPERTY?

60. At Common law it has been held that the assignment of the lease by the lessor, as security for the debt due to the assignee, constitutes a pledge of the rents, and that the assignee has the right to collect them and apply them to his debt. The pledgee, in that case, has a lien upon the rents, though the ownership of the lease remains with the debtor and pledgeor.*

61. This doctrine would hardly be upheld by the Civil law. Rent is an incorporeal thing. When due, it becomes a claim or credit belonging to the lessor. Rights can be pledged when they can be delivered symbolically to the pledgee; that constitutes his possession, the indispensable condition of the pledge. The symbolical delivery is the delivery of the *title* or instrument which proves the existence of the right or credit. "When a debtor wishes to pawn a claim on another person he must make a transfer of it in

* Jones, on Pledges, Sec. 19.
Dewey vs. Bowman, 8 Cal. 145.

the act of pledge, and deliver to the creditor to whom it is transferred the note or instrument which proves its existence if it be under private signature, and must endorse it if it be negotiable.”*

If the claim or credit is not proved by a *title*, or such instrument, it follows that it can not be pledged. Thus Laurent says: “It results from Art. 2076 that the pledge of a claim is impossible when it is not established by a *title*; in that case it is impossible to put the creditor in possession, and without that condition there is no pledge.”†

62. The lessor has no *title* or instrument proving the existence of his credit or claim for the rent. Even in case of a written lease, that document does not establish that the rent is not paid, and that therefore the lessor has a claim for it against the lessee.

It is only where, as is customary in some States, the lessee gives his promissory notes in representation of the rent, that the lessor could pledge them and thereby pledge the rent, whether due or not.

CAN A PATENT OF INVENTION BE PLEDGED?

63. This question has been decided affirmatively by the courts of France. The difficulty in such cases was that the patent is an incorporeal right, and for the pledge of such rights or credits, notice of the transfer must be given to the debtor to make the pledge valid.

* Civil Code of Louisiana, Art. 3156.

Laurent, *Droit Civil*, Vol. 28, Sec. 478.

† Laurent, *Droit Civil*, Vol. 28, Sec. 477.

Troplong, *Nantissement*, Sec. 278.

There is no debtor of the patent. Hence no notice is possible. The French courts held that in default of a provision of the law on that point, the pledge was valid without notice.*

But the pledgee has no right in that case to work the patented invention and sell the articles manufactured under it. This right remains with the inventor. The pledgee would be infringing upon the patent if he did.†

CAN WORKS OF THE MIND, EITHER ARTISTIC OR LITERARY, BE PLEDGED?

64. This has also been decided affirmatively by the Courts of the Civil law, provided the work of the mind, artistic or literary, has been materialized by writing, printing, engraving and such other ways, and that the manuscript, or printed or engraved article has been put in the possession of the pledgee. It has been held, in such cases, that the right of the reproduction of the work does not belong to the pledgeor but to the pledgee. The profits accruing to the latter would go to the extinguishment or reduction of the debt.‡

* Laurent, *Du Gage*, Vol. 28, Secs. 462-465, p. 455.

Aubry et Rau, Vol. 4, p. 205.

Baudry-Lacantinerie, *Nantissement*, Vol. 1, p. 19.

Dalloz, 1865, 2, 231.

† Pont, *Des Petits Contrats*, Vol. 2, Sec. 1103.

‡ Baudry-Lacantinerie, *Nantissement*, Vol. 1, p. 19.

Laurent, Vol. 28, Sec. 444.

Dalloz, 1875, 2, 43.

CHAPTER V.

65. A pledge may be given to secure the fulfilment of any legal obligation, *pro cuacumque obligatione*, as well as the payment of a moneyed debt. Thus, the obligation of a lessee to keep the leased premises in good order, as well as to pay the rent, may be secured or guaranteed by a pledge given to the lessor. The obligation of the vendor to deliver the thing sold may be secured or guaranteed by a pledge, as well as the obligation of the purchaser to pay the price of sale. A surety or a warrantor may be secured by a pledge against the consequences of his eventual liability. In a word, pledges may be given for simple or conditional obligations and for all lawful transactions which may be the subject of trade or business. If the principal contract is unlawful or void, the pledge given to secure it is clearly null. But if the principal obligation is valid, whatever may be its origin, its subject and its purpose, the fulfilment of it may be secured by pledge. The principle is the same whether the source of the obligation is a contract, a judgment, a statute, or a tort.*

66. The definitions of pledge by Sir William Jones and Lord Holt are, therefore, defective. The former said that it is: "A bailment of goods by a debtor to his creditor to be kept till the debt is discharged." And

* Troplong, *Nantissement*, Sec. 24.

Baudry-Lacantinerie, *Nantissement*, Sec. 10.

Lord Holt says that the pledge takes place: “ When goods and chattels are delivered to another as a pawn to be security for money borrowed of him by the bailor.” Judge Story, by the light of Civil law, could not fail to see the deficiency of these definitions, and said: “ The foregoing definitions are sufficiently descriptive of the nature of a pawn or pledge; but they are in terms limited to cases where a thing is given as a mere security for a *debt*; but a pawn may well be made as security for any *other engagement*. The definition of Domat is, therefore, more accurate, because it is more comprehensive, viz.: that it is an appropriation of the thing given for the security of an engagement. And in the Common law it may be defined to be a bailment of personal property as security for some debt or engagement.”*

67. And again, he asserts the principle in positive terms: “ It matters not what is the nature of the debt or engagement. The contract of pledge is not confined to an engagement for the payment of money; but it is susceptible of being applied to any other lawful contract whatever.”† It is curious enough that in this, as in so many other instances, the great expounder of the Common law of England and of the United States, only supports his position by the authority of Domat and Pothier, the pillars of the Civil law in France during the seventeenth and eighteenth centuries.

* Story, on Bailments, Sec. 286.

† Story, Bailments, Sec. 300.

68. Judge Story's remarks condemnatory of the definition of the pledge were made to apply also to that of Pothier, which, he says, is in the following words: A contract by which a debtor gives to his creditor a thing to detain as security *for his debt*. Judge Story is mistaken in limiting the signification of the word *debt*, so far as the Civilians are concerned, to a *moneyed* debt. In the Civil law the word has a larger meaning. It signifies the obligation resulting from a contract, whether it is to pay money, or to do something, or not to do something. The party to whom the obligation is due is the creditor; the party who is to perform the obligation or promise, is the debtor, whether money is to be paid or something else to be done. Payment by the debtor means the fulfilment or performance of the obligation, and not merely the payment of money. In the language of the Civilians, we *pay a thing*, as well as a sum of money.

69. In the same definition of the pledge, when Pothier says that the debtor *gives* to the creditor something to detain as security for the debt, he does not mean that a *gift* is made of the thing. If the ownership of the thing was conveyed to the creditor it would be a pledge no longer. *To give*, in the Civil law, when used on the subject of obligations, means to deliver.*

The Civil Code of Louisiana, borrowing its doctrinal part from Pothier, states: "By payment is meant, not only the delivery of a sum of money, when such is the obligation of the contract, but the performance of

* Pothier, on Obligations, Vol. 2, Sec. 494 *et seq.*

that which the parties respectively undertook, whether it be to give or to do.

“He who is bound to do, or not to do, or to give, is indifferently called the obligor or the debtor; and he to whom the obligation is made, is, in like manner, without distinction called the obligee or the creditor.”*

70. The Code of Louisiana also states the meaning of the words *to give*, in the Civil law, on the subject of Obligations. “The term to give, in this division of obligations, is applied only to corporeal objects, that may be actually delivered from one to another; and it includes the payment of money as well as the delivery of any other article. A covenant respecting an incorporeal right comes under the definition of contracts to do or not to do, because some act, besides that of delivery, is necessary for the transfer of such rights.”†

With this understanding of the Civil law terms, the definition of the contract of pledge in the Code of Louisiana and in the Code Napoleon is correct. The former says: “The pledge is a contract by which one debtor gives something to his creditor as a security for his debt.” And the French Code defines the same contract in these words: “The pledge is a contract by which a debtor delivers a thing to his creditor for security of the debt.”‡

* Civil Code of Louisiana, Arts. 2131, 2132.

† Civil Code of Louisiana, Art. 1905.

‡ Civil Code of Louisiana, Art. 3133.
Code Napoleon, Art. 2071.

71. As we have seen before, the pledge is itself a contract, but it is not limited to contractual obligations, and may secure obligations arising from other sources, and even those arising from torts. The Code of Louisiana enunciates the principle in these terms: "Every lawful obligation may be enforced by the auxiliary obligation of pledge."*

But it is important to observe that, when a pledge is given to secure the fulfilment of another obligation than a moneyed debt; in other words, when the obligation secured consists in doing something; the amount for which the pledge is given must be fixed in the contract of pledge. This is as necessary as in the case of a mortgage. Parties who deal with pledgeors or mortgageors must know to what extent their property is already encumbered. Thus, if a pledge is given to secure the faithful administration of a corporation officer, a sum must be fixed to the extent of which, and no more, the pledge will answer.†

72. A pledge may be validly given to secure the debt or obligation of another person than the pledgeor. It is then a mere matter of agreement and assent of the parties, resting upon the general principles of the law of contract. The rule existed in the Roman law; the principle has been adopted by the Common law and it is incorporated in the modern Civil law. The Code Napoleon provides: "The pledge may be given by a third person for the

* Civil Code of Louisiana, Art. 3136.

† Laurent, Du Gage, Sec. 454.

debtor.”* The Civil Code of Louisiana contains the same provision: “A person may give a pledge, not only for his own debt, but for that of another also.”†

Judge Story states that the rule is part of the Common law, and expresses it in these terms: “It is of the essence of the contract that the thing should be delivered as a security for some debt or engagement. But it is of no consequence whether the debt or engagement for which the security is given is that of the pledgeor or of any other person; for if there is an assent by all the parties, it is equally obligatory in each case.”‡

It is in the same manner that a person may give a mortgage on his property to secure the debt of another person. §

73. In case of a person pledging his property for the debt of another, there intervenes, says Pothier, a double juridical operation, a contract of pledge between the third person and the creditor, with all its proper effects, as if the pledge had been given by the debtor; and between the third person and the debtor, a contract of mandate, or a *quasi*-contract of *negotiorum gestor*, by virtue of which the third person has a right of action against the debtor if the pledge has served to pay the debt. ||

* Code Napoleon, Art. 2077.

† Civil Code of Louisiana, Art. 3141.

‡ Story, on Bailments, Sec. 300.

§ Civil Code of Louisiana, Art. 3295.

Pont, Du Nantissement, Vol. 9, Sec. 1141.

Pothier, Nantissement, No. 16.

74. There is some analogy between the position of the pledgeor in such case and that of the surety, with this difference, that the surety has bound himself personally for the debt of another, and that the pledgeor has bound his property but not himself. The difference is tersely expressed in the Latin maxim: *Res non persona debet*. The pledgeor in that case can not plead the benefit of discussion, or his discharge, on account of indulgence granted to the debtor by the creditor, as the surety has the right to under the law of suretyship.*

75. But the analogy between the contract of suretyship and the contract of pledge, when the pledge is given to secure the debt of another person than the pledgeor, lies also in this, that the surety is and remains bound even when the principal debtor is discharged for some reason of personal incapacity, such as minority or coverture; and that the pledge is and remains valid when the debt which it secures is annulled for the same reasons of minority or coverture. Both contracts are accessory contracts, and, as a rule, follow the fate of the principal contract, and if the latter falls they fall with it. If the obligation which they are both intended to secure is null for some cause or other, they, the accessory contracts, are null also, as they can not support what is set aside. But when the principal obligation is

* Troplong, Nantissement, Secs. 375, 376.

Pont, Nantissement, Sec. 1141.

Baudry-Lacantinerie, Nantissement, Sec. 12.

Laurent, Du Gage, Sec. 443.

James vs. Pike, Lapeyre & Brother, 23 La. An. 477.

only relatively void, or voidable, owing to an exception personal to the debtor, the surety can not plead that exception and he remains liable. So the pledgeor can not take advantage of the incapacity personal to the debtor for whom he has given the pledge, and the latter remains valid.*

76. The contract of pledge being an accessory one, intended only to secure a principal obligation, like the contract of mortgage and the contract of suretyship, it is evident that when the principal obligation is null the pledge is necessarily null also, and lapses. *Accessorium sequitur principale*. It can not subsist when there is no debt for it to secure.†

The Civil Code of Louisiana has enacted the principle in two articles :

“ If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it.”

“ If the obligation is null, so also is the pledge.”‡

Whether the conditional obligation falls by virtue of the condition, or whether the obligation is null from its own nature, it is evident that the pledgeor is entitled to the restitution of the pledge, and that the

* Troplong, Du Cautionnement, Secs. 73, 75, 76, 82.

Pont, Du Cautionnement, Secs. 45, 46.

Civil Code of Louisiana, Art. 3036.

Code Napoleon, Art. 2012.

Brandt, Suretyship, Sec. 121.

Kennedy vs. Bossiere, 16 La. An. 448.

Levy vs. Wise, 15 La. An. 38.

Burge, on Suretyship, pp. 6 and 7.

† Baudry-Lacantinerie, Nantissement, Sec. 9.

‡ Civil Code of Louisiana, Arts. 3137, 3138.

pledgee has no right to retain it the moment there is an end to the principal obligation.*

77. We must note, however, an important point on this subject. If the pledge has been given to secure an illegal or immoral obligation, the pledgeor has no right of action in court to recover it. It is not, in that case, that the pledgee has the right to retain the thing pledged. It is not that, the principal obligation being null, the pledge is valid. It is simply that the law will not lend its aid to a party who has violated its commands, to recover his property even from the hands of a wrongdoer, or of one who detains it without right or authority. In all such cases the courts dismiss both parties and leave them where their own conduct has led them. The rule is inflexible that litigants must come into court with clean hands. The consequence is that the party in possession of the property transferred for an illegal purpose shall not be disturbed by legal proceedings. †

78. This principle is part also of the Common law, which, like the modern Civil law, has taken it from

* Story, on Bailments, Sec. 361.

Troplong, Nantissement, Sec. 419.

Pothier, Pandects, Book 20, Tit. 6, Sec. 1, l. 8.

† Civil Code of Louisiana, Art. 1893.

Code Napoleon, Art. 1133.

Pothier, Des Obligations, Sec. 45.

Larombière, Des Obligations, Vol. 1, Sec. 10.

Gravier vs. Carroby, 17 La. 118.

Davis vs. Holbrook, 1 La. An. 178.

Windham vs. Cerf, 19 La. An. 498.

Boyd vs. Chaffe, 21 La. An. 476.

Tanneret vs. Marshall, 21 La. An. 619.

Leveret vs. Creditors, 22 La. An. 105.

Dean vs. Martin, 24 La. An. 103.

Antoine vs. Smith, 40 La. An. 560.

the Roman law. "The Common law maxim is, says Chitty, *ex turpi contractu oritur non actio*." The reason of the rule is the same in both systems. It is not to protect the party who has entered into an unlawful agreement and refuses to execute it, that the law will not compel him to fulfil his promise or to return what he has unlawfully received; it is to benefit the public and improve the public morals.*

And, in case of property deposited under an unlawful contract in the hands of a party who refuses to return it, both the Civil and the Common law rest their principle upon the Roman maxim *in pari delicto potior est conditio defendentis et possidentis*.

79. This maxim was applied and commented upon by a Justice of the Court of Queen's Bench in the following words: "The maxim that '*in pari delicto potior est conditio possidentis*, is as thoroughly settled as any proposition of law can be. It is a maxim of law established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, 'for the courts will not assist an illegal transaction in any respect:' per Lord Ellenborough in *Edgar vs. Fowler*, 3 East 222; *Collins vs. Blantern*, 2 Wils.

* Chitty, on Contracts, 4th Am. Edit., p. 513.
 Parsons, on Contracts, Vol. 1, Sec. 456 *et seq.*
 Wharton, on Contracts, Vol. 2, Sec. 335 *et seq.*

341 ; Lord Mansfield in *Holman vs. Johnson*, Cowp. 343.”*

In that case the contention was between the plaintiff, who had pledged a bank note as security for the payment of wine and victuals, and the defendant, who had furnished them for the use of a house of prostitution. The plaintiff sued for the restitution of the pledge. It does not appear in the report of the case whether the debt was paid or not, when the pledgee demanded the return of the pledge ; and that fact does not seem to have been of any consideration in the controversy. The plaintiff tried by every possible technicality of pleading to avoid the issue of immorality in the transaction, but he failed in that ; and the Court held that he could not recover the pledge because it was given for an unlawful purpose.

So. It is worth noticing that one of the justices remarked on the trial : “ If a person lets a house for an immoral purpose, are his enforceable rights gone, so that he can not bring ejectment?”

This reflection is suggestive of serious difficulties, or rather, of the very grave consequences of the principle that, *in pari delicto potior est conditio possidentis*, and that the courts will not aid a guilty party to recover his property, although the wrongful detainer has no right or authority to keep it. A house is rented

* *Taylor vs. Chester*, L. R. 4 Q. B. 309.
King vs. Green, 6 Allen. 139.
Hall vs. Coreoran, 107 Mass. 251.
Morton vs. Gloster, 46 Me. 520.
Stewart vs. Davis, 31 Ark. 518.
Fisher vs. Kyle, 27 Mich. 454.

for a gambling establishment or to a prostitute, in a State where the law forbids gambling or prostitution. The lessor is aware of the character and of the purpose of the lessee. At the termination of the lease the lessee refuses to surrender the premises. The lessor brings an ejectment suit. Will the courts lend him their aid to obtain possession of his property? We are only repeating the *quære* of the English judge. But is it possible to answer it in the negative? *Has not the latter handed over his property in pursuance of an illegal or immoral contract*, in the words of the decision of the Court of Queen's Bench? Leasing a house for gambling or prostitution, where the same are prohibited, constitutes an illegal and immoral contract, so much so that the rent can not be recovered in court. *

Can there be any difference in law whether the property thus handed over be a bank note or a house, or any other species of property? But will the wrongful detainer keep it forever? As he has no right or title whatever, and the lessor is still the owner, can not the latter take it back by force, or by strata-gem? His creditors could, clearly, treat the property still as his, and reach it by attachment.

81. But we must observe, on the other side, that the authorities are not harmonious as to the degree of complicity of the lessor with the lessee, in the lease of a house for an illegal purpose, which will contaminate the lease itself and deprive the lessor of the aid of the courts

* Wharton. on Contracts. Secs. 348, 374.

to enforce his rights. In some cases it was decided that the mere knowledge of the lessor that the lessee rents the house for the unlawful purpose does not render him a participant in the illegal and immoral undertaking, and does not, therefore, invalidate the contract.

“To annul a contract,” says Mr. Wharton, “which promotes an illegal object, not only there must be a knowledge that the object is illegal, but there must be complicity in the performance of an illegal act. * * * There must be a union of purposes between the party supplying and the party supplied in order to infect the former with the latter’s criminality.”*

The purpose of the lessee, in the lease in question, is to keep a gambling establishment or the house of prostitution; but the purpose of the lessor is not the same; his purpose is to lease his property, and that purpose may not be, and needs not be, and is not ordinarily, that the house should serve for the prohibited object. There is not, therefore, presumably, a complicity on the part of the lessor in the performance of the lessee’s illegal act.

82. Finally, it is in this respect of the contract of pledge as it is of all contracts. If the agreement is based upon an unlawful consideration, but the contract is yet unexecuted or its purposes or object has not yet been carried out, the pledgeor may repudiate his engagement and demand the restitution of the thing pledged, and the Courts in that case will lend him their aid to recover his property. The reason is

* Wharton, on Contracts, Secs. 343, 348, 374.

that in such cases the plaintiff's claim is not to enforce, but on the contrary to repudiate an illegal contract. The object of the suit is not to get paid for something illegally done or to get back property handed over for an unlawful purpose after the purpose has been fulfilled, but to prevent the defendant from using an illegal pretext to retain money or property unlawfully detained.*

83. This doctrine is firmly established. The Supreme Court of the United States expounded it at length in the case of *Spring Company vs. Knowlton*, 103 U. S. 49, and quoted the following paragraph of the Decision in *Taylor vs. Bowers*, 1 Q. B. D. 291, in which Lord Justice Mellish said: "If the illegal transaction had been carried out, the plaintiff himself, in my judgment, could not afterward have recovered the goods. But the illegal transaction was not carried out; it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any step to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid, or goods delivered, for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal pur-

* Wharton, on Contracts, Secs. 352-354.

Parsons, on Contracts, Vol. 2, p. 746.

Addison, on Contracts, Vol. 2, Sec. 1412.

Story, on Contracts, Vol. 2, Sec. 617.

pose is carried out; but he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action: the law will not allow that to be done.'*'

* *Spring Company vs. Knowlton*, 103 U. S. 59.
Taylor vs. Bowers, 1 Q. B. D. 291.

CHAPTER VI.

FORMS AND ESSENTIALS OF THE PLEDGE.

84. The pledge being a contract of natural law is formed, at Common law, by the mere consent of the parties and delivery of possession of the thing pledged to the pledgee. No written act is necessary as evidence of the contract. No registration is necessary as notice to third persons. Possession by the pledgee is notice to the world. But there must be delivery and continued possession in the pledgee. This is of the very essence of the contract of pledge. Without possession there is no valid pledge. The reason of it is, not only to secure the rights of the pledgee, but also to prevent fraud and imposition by the pledgeor. If the thing given in pledge remained in the hands of the latter, he could pledge it to several persons at the same time, deceiving them all. Besides this, he would preserve a fallacious credit from the property in his possession, ostensibly answering for his obligations.

In the emphatic language of Troplong: “ By dispossessing himself, the debtor announces to third persons who deal with him that he is impoverished by that much. It is necessary for commerce that this should be shown clearly; it gives the measure of the debtor’s credit. Where would business be if things

were pledged without delivery! what frauds! what deceptions! what losses for third persons! ”*

85. The Code of Louisiana provides in clear terms for the necessity of delivery and possession of the pledge as a condition of the validity of the contract.

“It is essential to the contract of pledge that the creditor be put in possession of the thing given to him in pledge, and consequently that actual delivery of it be made to him, unless he has possession of it already by some other right.” Art. 3152.

“But this delivery is only necessary with respect to corporeal things; as to incorporeal things, such as credits, which are given in pledge, the delivery is merely fictitious and symbolical.” Art. 3153.

“In no case does this privilege subsist on the pledge except when the thing pledged, if it be a corporeal movable, or the evidence of the credit if it be a note or other instrument under private signature, has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties.” Art. 3162.

86. On the principle that, for the validity of the pledge, the pledgee must have possession of the thing pledged, and that the reason of it is to prevent fraud and deception by the pledgeor, there is a perfect accord between the Civil law and the Common law.

* Troplong, *Du Nantissement*, Secs. 297, 298.
Laurent, *Droit Civil*, Vol. 28, Secs. 469 *et seq.*
Code Napoleon, Art. 2076.
Civil Code of Louisiana, Art. 3152.
Casey vs. Cavaroc, 96 U. S. 467.

Mr. Jones says in words of the same purport as the articles of the Louisiana Code: "To constitute a pledge the pledgee must take possession; and to preserve it he must retain possession. An actual delivery of property capable of personal possession is essential." *

Judge Story says also: "It is of the essence of the contract that there should be an actual delivery of the thing." †

The Supreme Court of the United States, in the leading case of *Casey vs. Cavaroc*, 96 U. S. 467, speaks in the same sense: "The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

87. It is this possession of the pledgee which ordinarily distinguishes the pledge of personal property from the chattel mortgage of the Common law, and makes it a mode of greater security for the creditor. The agreement between the parties, and the law under which the agreement is to be enforced, provide in both cases that the property is to serve as security of the debt and the creditor to be paid out of the proceeds, by privilege and preference over the other creditors of the debtor. But the mortgagee is not

* Jones, on Pledges, Sec. 23.

Kent, Comm., Vol. 2, p. 581, note 1.

† Story, Bailments, Sec. 297.

Am. and Eng. Ency. of Law. Vol. 18, p. 595 *et seq.*

necessarily, or even ordinarily, like the pledgee, put in possession of the mortgaged property. He has, therefore, no control over it, no superintendence of it, until, at least, when the time to foreclose his mortgage has come, and, in the meantime, a dishonest debtor may carry it off. It is true that his right of preference is declared and established in a deed or act in writing, in which the legal title is transferred to him under condition, which is recorded in the books of the county and is notice to the world. This right of the mortgagee, though only intended to secure his claim, extends to a conditional property of the thing mortgaged, and, in case of the mortgage of real estate, which can not be removed, the security may be sufficient; but, in the chattel mortgage, it is evident that the creditor has none of the safety of the pledge owing to the want of possession, and for that reason it is comparatively seldom resorted to in purely commercial transactions.

88. Yet, by statute, in some cases of chattel mortgage, the creditor is put in possession of the thing mortgaged, and, consequently, it has often been held in doubt whether the transaction was a pledge or a mortgage, though whenever the possession passes to the creditor in a contract of security, the law favors the conclusion that it is a pledge and not a mortgage.*

As the chattel mortgage and the pledge are distinct

* *Bank vs. Marshall*, 11 Fed. R. 19.
Myer's Fed. Decisions, Vol. III, p. 49.
Jones, on Pledges, p. 14.
Edwards, on Bailments, p. 193.

and different contracts governed by different rules and producing different effects, the fact that, in some cases, it is doubtful whether the contracting parties intended that their agreement should be a mortgage or a pledge, shows that the Common law, in that respect, is defective and unsatisfactory, as every law is which creates confusion.

89. The advantage of the Civil law on this point is that, inasmuch as personal property can not be the subject of a mortgage, it can never be a question whether the contract is a pledge or a mortgage when possession of the thing is given to secure a debt

The modern Civil Law, more exact and more exacting, more guarded and more solicitous of the rights of third persons in this respect, does not allow the mortgage of personal property, and demands that the contract of pledge should be in writing, except in case of the pledge of commercial paper, stocks, etc. For the pledge of these securities the Civil law is also in accord with the Common law, and permits the pledge of them without any act in writing, and by mere delivery to the pledgee. There, the necessities of commerce are paramount.*

But for the pledge of all other personal property there must be, in the Civil law, an act in writing passed between the parties, in which the amount of

* Civil Code of Louisiana, Art. 3158.
Code Napoleon, Art. 2084.
French Code of Commerce, Art. 95.
Troplong, Nantissement, Sec. 118 *et seq.*
Goirand, French Code of Commerce, p. 152.

the debt secured is stated and the thing pledged is described ; the act must also be recorded.*

90. In Louisiana it is now a question where the act of pledge must be recorded. By the Civil Code of 1825, the registry should have been in the office of a notary public. By the Revised Civil Code of 1870, which is now the law in that State, the place of registry is not mentioned. †

91. The transactions in which personal property, other than commercial paper, is pledged, are not ordinarily themselves commercial, and there is no reason, where they are concerned, for the prompt and simple mode of the pledge by mere delivery to the pledgee.

But though the Civil law, as well as the Common law, permits the pledge of commercial paper and stock by simple delivery to the pledgee, without the written act, in order to facilitate commercial or financial transactions, yet the written act is necessary and generally used, for the purpose of stipulating in favor of the pledgee the right to sell the pledge at public or private sale, with or without notice to the pledgeor, etc., which right only exists in the contract of pledge if agreed upon by the parties.

The object of the wise rule of the Civil law providing for a written act for the pledge of all property other than commercial, is entirely to protect third

* Civil Code of Louisiana. Art. 3158.

Code Napoleon, Art. 2074.

Martin vs. Creditors. 15 La. An. 165.

† Civil Code of Louisiana of 1825, Art. 3125.

Revised Civil Code of Louisiana, Art. 3158.

persons against fraud and collusion between pledgeor and pledgee.

The date of the written act shows whether at the time the pledge was granted the pledgeor could honestly give a right of preference to the pledgee. The statement of the sum secured by the pledge shows for what amount the pledgee was, at that moment, a creditor of the pledgeor. The description of the thing pledged prevents the fraudulent subsequent substitution of other and more valuable property to that originally pledged.

92. The rule that the thing pledged must be described in the act of pledge so as to be identified, must be strictly observed. For instance, the books in a bookcase were pledged without stating the number of volumes and the titles of the books. There was no sufficient description of the property pledged, and the contract was declared null. The French Courts held that, in such a transaction, the parties could fraudulently substitute some books of little value to others of great value, or *vice versa*, and thereby deceive and defraud other creditors of the pledgeor.*

A distinguished Civilian, Professor Baudry-Lacantinerie, in his recent book on the subject of Pledge, says that the law demands the *specialization* of the thing pledged in order to prevent fraud by the substitution of an article of little value to a valuable

* Troplong, Nantissement, Sec. 192.
Laurent, Vol. 28. Sec. 455.
DeBlois vs. Reiss, 32 La. An. 583.

one, which the debtor would thereby remove from his creditor's reach. He gives the example of a pledge of oil designated in the act of pledge as *seed oil*. The Court declared the pledge null for want of sufficient description of the thing pledged to identify it; the seed might be hemp oil, colza oil or poppy oil.*

It is also necessary for the validity of the pledge that the amount of the debt secured be stated in the written act. The reason of this is equally to protect third persons, and to prevent collusion and fraud between pledgeor and pledgee. The rule is the same as in the contract of mortgage. But, and also as in mortgages, the pledge may be given to secure a debt or obligation, which at the time of the pledge is not yet fixed or definite. For instance, a pledge may be given to secure a credit. The amount of the credit must be determined or fixed. The sums drawn under the credit are secured by the pledge. If the sums drawn exceed the credit, the excess is not secured by the pledge, even if the collaterals exceed the credit and would be sufficient to cover the amount drawn. If the sums drawn do not amount to the credit, the pledge lapses for the difference between the amount drawn and that of the credit.†

As all the property of the debtor is, by legal intent, *the common pledge of his creditors*, the law will not permit a particular pledge which is certain neither as

* Baudry-Lacantinerie, Nantissement. Sec. 93.

† Baudry-Lacantinerie, Nantissement. Sec. 52.
Laurent. Droit Civil, Vol. 28, Sec. 454.

to its date, nor as to the claim which it secures, nor as to the property by which it secures it, and which may, therefore, be a fraudulent imposition upon third persons.*

94. But the written act prescribed for the validity of a pledge needs not be in any formal or sacramental terms. It is only necessary that it should state the amount of the debt secured, the description of the property pledged and the agreement of the parties to pledge it. The act may be in authentic or notarial form, or simply by private writing. It may be part of the promissory note or instrument itself which the pledge is intended to secure. In fact, this form of *pledge note* is now in daily use with many of the moneyed or banking institutions of this country. In a case coming up from Louisiana, where the Civil law requirement of the written act of pledge prevails, the Supreme Court of the United States had occasion to pass upon the validity of such *pledge notes*. The instrument was in these words :

“ NEW ORLEANS, October 29, 1883.

“ \$5000.00.

“ Forty days after date I promise to pay to the order of A. Ermann, Esq., five thousand dollars, for value received, with interest at the rate of eight per cent. per annum from maturity until paid. Payable at the

* Troplong, Du Nantissement, Sec. 108 *et seq.*
Laurent, Droit Civil, Vol. 28, Sec. 447, p. 438.
Duranton, Droit Civil, Vol. 18, Sec. 510.
Baudry-Lacantinerie, Du Nantissement, Sec. 44 *et seq.*
Pont, Du Nantissement, p. 584 *et seq.*

People's Bank of New Orleans. This note is secured by a pledge of the securities mentioned on the reverse hereof, and in case of its non-payment, the holder is hereby authorized to sell the said securities at public or private sale, without recourse to legal proceedings, and to make any transfers that may be required, applying the proceeds of sale toward payment of this note. Margins to be kept good.

“ L. MEYER.”

“ Endorsement: Five warehouse receipts, dated October 29, 1883, numbered 1, 2, 3, 4 and 5, issued by Meyer, Weill & Co. to L. Meyer, and by him endorsed to A. Ermann, payee

“ L. MEYER.”

The warehouse receipts stated with sufficient precision what the goods receipted for were.

The Court held the pledge in that form valid, and concluded that the note disclosed the amount of the debt as well as the fact of the pledge—and the nature of the property pledged; and that the delivery of the warehouse receipts was a delivery of the pledge.*

This form of pledge, or something analogous, is common in many of the States in commercial or financial transactions.

95. But it is only in order to produce its effects against third persons, and secure to the pledgee his right of privilege and preference, that the act of pledge

* Freiburg vs. Dreyfus, 135 U. S. 478.

in writing is necessary, even in the Civil law. When there are no other creditors of the pledgor contending with the pledgee—in other words, between the pledgor and pledgee themselves, the act in writing is not indispensable, and the pledge is valid without it, provided the thing pledged is delivered to the pledgee and remains in his possession.

Laurent, in his commentaries on the Civil law, states this principle in the following words: “Are these forms (speaking of the act of pledge) of the essence of the contract of pledge, in such a way that it can not exist unless they are fulfilled? The very text of Art. 2074 (Code Napoleon) proves that the forms which it prescribes concern only third persons. After saying that the pledge confers upon the creditor the right to be paid out of the thing pledged *by privilege and preference over other creditors*, the Code adds: ‘This *privilege* takes place only if there has been a written act,’ etc. Therefore it is for the purpose of securing his right of preference that the pledge creditor must fulfil the formalities prescribed by Art. 2074. These formalities are, consequently, foreign to the relations which the pledge establishes between the creditor and the debtor, independently of the privilege.”*

96. The same reasoning should apply to the Loui-

* Laurent, Droit Civil, Vol. 28, Secs. 446, 447.

Troplong, Nantissement, Sec. 114.

Pothier, Nantissement, No. 17.

Merlin, Répertoire, *Verbo* Gage.

Baudry-Lacantinerie, Nantissement. Vol. 1, p. 22.

siana law on this point, for Art. 3158 of its Civil Code is taken almost *verbatim* from Art. 2074 of the Code Napoleon commented upon by Laurent.

In fact, the Court of Louisiana has so decided already many years ago, and held that a contract of pledge, in which no written act had been passed, was valid and binding between the pledgeor and the pledgee, there being no third persons, or creditors of the pledgeor interested in the matter.*

97. It would be well for the Common law States to adopt the rule of the written act of pledge, as they have adopted so many other wise provisions of the Civil law, and to provide by statute that all pledges, except of commercial or negotiable paper, should be by written act, under penalty of nullity so far as third persons are concerned. Deceptive transactions and fraudulent preferences would be rendered more difficult, and honest creditors better protected. There would then be also a more perfect distinction between the chattel mortgage and the pledge.

* *Matthews, Finley & Co. vs. Rutherford*, 7 La. An. 225.

CHAPTER VII.

PLEDGE IN THE FORM OF SALE.

98. Though by the Common law the contract of pledge needs not be in writing in any case, and though by the Civil law there must be a written act in all except cases of commercial pledge, it is of frequent occurrence, both in the countries of the Common law and those of the Civil law, to give to the pledge the form of a sale. The legality of such a transaction has sometimes been contested, but the great preponderance of authority is in favor of its validity, especially in the Common law States. This doctrine is based upon the principle that the contracting parties may give to their agreement the form and the name that they choose, provided it is not fraudulent, does not injure third persons, and does not violate any requirement of the law.

99. Troplong says on this point: "If the parties, instead of passing a contract of pledge, employed the simulated form of a sale, could third persons contest the validity of the pledge? No more, in my opinion, than they could attack, on account of the form, a donation disguised under the form of a sale. The forms of the donation are, however, very solemn. They have been established for a very useful purpose. Yet, it is certain that the forms of an onerous contract, such as a sale, may effectually replace them. Why,

then, should not an ostensible sale replace the pledge? It is what I can not understand. We will see later on, however, that this point has been contested by sound writers.*

100. But Laurent thinks that such a transaction is generally injurious to third persons and therefore null and void. He is of opinion that, on principle, a pledge under the form of a sale is invalid. He says, however, that when the sale is made with all the formalities required for the pledge, the pledgee put in possession and third persons are not injured, the transaction may be valid, and that the jurisprudence of France is settled in that sense.

Yet, in the two cases that he cites, one of which was decided by the Court of Cassation, and in both of which the pledge, disguised in the form of a sale, was declared valid, it is curious to observe that neither the sum to be secured in one case was stated in the act, nor delivery to the pledgee of the thing pledged, in the other case, seemed to have taken place.

In both cases the pledge was of a vessel. There was no fraud or imposition in the transactions, and third persons were not injured.

The facts in each case evidently influenced the court and induced it to depart from the strict principles of the law of pledge.

101. Baudry-Lacantinerie says that the pledge of a ship, strictly speaking, is legally impossible, unless

* Troplong, Nantissement, Sec. 204. p. 208.

the pledgee is put in possession, which is seldom practicable, and for that reason the courts have recognized the validity of the pledge of the ship in the form of a sale.*

102. Aubry et Rau, who are also Civilians of high authority, are of the same opinion as Laurent and condemn the pledge made in the form of a sale.†

103. Baudry-Lacantinerie is of opinion that the pledge under the form of a sale is valid if all the conditions necessary for the pledge exist, and the creditor is put in possession. In such a case he thinks that the latter is entitled to his right of preference over the other creditors of the debtor; and he approves of the jurisprudence which has recognized the principle.‡

Mr. Pont, the continuator of Marcadé, and a Justice of the Court of Cassation, and himself a celebrated law writer in France, is also of the opinion that the pledge under the form of a sale is perfectly valid.§

104. The jurisprudence of Louisiana seems to be settled upon this point, to the effect that the contract of pledge is valid in the form of a sale, when it contains all the requirements of the pledge, is not fraudulent or injurious to third persons, and possession of the thing pledged is delivered to the pledgee or ostensible vendee.

* Baudry-Lacantinerie, *Nantissement*, Vol. 1, p. 50.

† Laurent, *Droit Civil*, Vol. 28, Sec. 488.

Aubry et Rau, Vol. 4, p. 703, Sec. 432, n. 13.

Daloz, 1876, I, 347.

Same, 1852, 2, 8.

‡ Baudry-Lacantinerie, *Nantissement*, Sec. 88.

Duranton, *Droit Civil*, Vol. 23, Sec. 538.

Cassation, 1877, July 9; 1879, March 11.

§ Pont, *Nantissement*, Sec. 1090.

In a case in which the pledge was made in the form of a sale, the Court of that State recognized the principle in these words :

“ Neither does it follow because parties have clothed their contract in one form instead of another that it will not avail in either. There is no such penalty declared by the lawgiver, and the courts can not supply it. Then, is there anything immoral in using the contract of sale as the security of money advanced or to be advanced in good faith? We think not. The Civil Code has itself traced certain provisions of law in regard to sales with a power of redemption. See Art. 2545 *et seq.*”*

105. The assignment or transfer of property is necessarily one of two things: either it is merely a contract of security, such as mortgage or pledge, in which the assignor or transferrer retains the ownership of the property, passing only the legal title, under condition, to the assignee or transferee for the purpose of securing a debt; or the assignment or transfer passes, not only the title, without condition, to the assignee or transferee, but also the very ownership of the property, as does a sale, and also, what the French Civilians call a *dation en paiement*, a giving in payment, which is not securing a debt, but paying it.

If the assignment does not convey the ownership, it is clearly intended and used for the purpose of

* Wolf vs. Wolf, 12 La. An. 531.
See also :

Heber vs. Thompson, 47 La. An. 808.

securing a debt. In that case, if the thing transferred is personal property, the assignment constitutes at Common law either a chattel mortgage or a pledge. If the property is delivered to the assignee, it is a pledge; if it is not delivered, it is a mortgage; provided, of course, that the formalities for that kind of contract have been observed.

106. The assignment to the pledgee is necessary in many cases to enable him to have not only the possession, but also the full control of the thing pledged and the legal means to enforce the pledge by foreclosure or otherwise. It is the completion of the pledgee's right of possession. This is the reason why, in the Common law, this mode of assignment to the pledgee is often resorted to.* It is not necessary in the countries of Civil law, where the use of written acts of pledge is prescribed by law.

But, in some cases, the Civil law itself prescribes that a pledge be made by the *transfer* of the thing pledged to the pledgee. That is in the pledge of incorporeal things, such as credits and other rights. We have seen that the Civil Code of Louisiana provides that, when a debtor wishes to pawn a claim on another person, he *must make a transfer of it* to the pledgee in the act of pledge. And we have seen also that the Code Napoleon provides that for the pledge of credits, an act in writing, authentic or pri-

* Jones, on Pledges, Sec. 9.
Casey vs. Cavaroc, 96 U. S. 467.
Clarke vs. Iselin, 21 Wall. 360.
Gay vs. Moss. 34 Cal. 125.

vate, must be passed, which shall transfer the credits to the pledgees and shall be notified to the debtors of the credits.*

107. We have on this subject observed the perfect contrast of the Civil law and the Common law, in regard to this notice: its indispensability in the Civil law and its unnecessariness in the Common law; that in the Civil law the notice to the debtor constitutes the possession of the credit; and that in the Common law the right of the assignee of the credit depends only upon the priority of the assignment.†

108. Inasmuch as the transfer of the incorporeal things is prescribed for the contract of pledge, it is evident that such transfer does not pass the ownership to the pledgee but only the possession; that it is only a transfer *in guaranty*, leaving the pledgeor full owner of the thing pledged, subject only to the conditions of the pledge. ‡

In *Casey vs. Cavaroc*, the Supreme Court of the United States said: "In some cases, such constructive delivery can not be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security,—that of mort-

* *Ante*, Sec. 11 *et seq.*

† *Ante*, Sec. 18.

‡ Baudry-Lacantinerie, *Nantissement*, p. 44.

gage and that of pledge : mortgage by virtue of the title, and pledge by virtue of the possession.”*

The remark of the Court about the mortgage is incorrect so far as the State of Louisiana is concerned, because the mortgage of personal property is there unknown. Yet the case in which the remark was made was a case coming up from that State. But the principle is not the less declared by the Court that the transfer of title is only a transfer *in guaranty*; and that the pledge in that form, which is that of a sale, is valid, and even necessary in certain cases.

109. The written act of pledge is clearly the better mode of the pledge, as, in it, the parties stipulate all the terms and conditions of the contract, the right of the pledgee to sell at public or private sale, with or without notice to the pledgeor ; the right of the pledgee to purchase the thing pledged, etc. In the same deed the pledgeor may constitute the pledgee himself, or some third person, his agent to transfer the stock pledged, or fulfil any formality necessary to complete the title of the purchaser.

This agent is the *procurator in rem suam* of the Civil law, the agent whose procuration is coupled with his own interest and is not revocable by the principal or by his death or bankruptcy. †

* Casey vs. Cavaroc, 96 U. S. 477.
Ante, p. 14.

† Renshaw vs. Creditors, 40 La. An. 37.
 Allen, Bush & West vs. Nettles, 39 La. An. 791.
 Hunt vs. Rousmanier, 8 Wheat. 174.
 Story, on Agency, Sec. 164 *et seq.*
 Troplong, Mandate, Sees. 728, 737.

110. The pledge in the form of a sale is also objectionable because it contains a simulation, therefore a deception, which, on principle, is always objectionable, even when it is not fraudulent.

111. Under the liberal principle that the contracting parties may give to their agreement the form and name that they please, if third persons are not thereby injured, and the laws are not violated, the courts of Louisiana have recently recognized the validity of a pledge created in the form of a chattel mortgage, by a deed passed in another State, though the chattel mortgage, as such, is not known in Louisiana.*

But it would not be safe to consider that this point is settled in that State, and the decision is in direct opposition to previous cases.†

Indeed, the Court of Louisiana, in the case cited of *Delop & Co. vs. Windsor & Randolph*, said: "As a chattel mortgage is unknown to our law, it can not be enforced in this State. Movables are not susceptible of being mortgaged."

In the other and more recent case alluded to of *Bank vs. Janin*, speaking of a deed of chattel mortgage executed in the State of New York and the recognition of which was demanded in Louisiana, the Court said: "The act is given effect as a mortgage if it contains the essentials of a mortgage, or of a

* *Bank vs. Janin*, 46 La. An. 1001.

† *Delop & Co. vs. Windsor & Randolph*, 26 La. An. 185.

Hughes, Hyllested & Co. vs. Klingender Bros., 14 La. An. 845.

pledge if it contains as to form the requirements of an act of pledge.”

This seems to be a new direction given to the jurisprudence of Louisiana on this subject, presumably under the influence of the more modern ideas of enlarging rather than restricting the rule of comity between the States.

112. In accordance with this principle, the Court of the same State very recently decided that a deed executed in Michigan, between citizens of that State, and which, by the parties to the contract, was intended to operate as a mortgage on real estate situated in Louisiana, should be given effect in the latter State as a conventional mortgage affecting third persons after due inscription.*

Previous attempts to have such deeds enforced in Louisiana as mortgages on real estate were generally unsuccessful, the court holding that the Common law forms of mortgages could not be recognized in that State.†

It is well to observe, however, that in recognizing the validity of the common chattel mortgage in Louisiana so far as it has the effect of a pledge, the court has not given it the full effect of a chattel mortgage, inasmuch as the constitutional element of this kind of security is foreign to the legislation of that State, and is in direct conflict with the pledge of the Civil

* Gates vs. Gaither *et al.*, 46 La. An. 286.

† Thibodaux vs. Anderson, 34 La. An. 797.

Miller vs. Shotwell, 38 La. An. 890.

Howe vs. Austin *et als.*, 40 La. An. 323.

law. By the mortgage of the Common law the legal title passes conditionally to the mortgagee, and, if the property is not redeemed at the time stipulated, the title becomes absolute at law, though equity may interfere to compel a redemption.

But if the mortgageor does not demand the redemption, and, if the mortgagee is in possession of the thing mortgaged, he becomes the owner of it, to all intents and purposes, by virtue of the stipulations of the mortgage.*

113. By the Civil law of pledge, on the contrary, no title whatever, either legal or equitable, entire or qualified, general or special, passes to the pledgee. All such tenures or distinctions of property are unknown to, and repelled by, the Civil law. The pledgee has simply a right of retention on the property and a lien on its proceeds. But the title remains in the pledgeor. Both the Napoleon Code and the Civil Code of Louisiana provide that, until the pledgeor is divested of his property by foreclosure, if it takes place, he remains the owner of the thing pledged, which is in the hands of the creditor only as deposit to secure his lien on it.†

* Story, on Bailments, Sec. 287.

† Civil Code of Louisiana, Art. 3163.
Code Napoleon, Art. 2079.

CHAPTER VIII.

CONTRACTS OF SECURITY, WHICH ARE NEITHER PLEDGES NOR MORTGAGES.

114. There are certain innominate contracts of a pignorative character which are neither pledges nor mortgages, and which are formed under the provisions of the Civil law relative to the pact or right of redemption in the contract of sale. Real estate and not personal property is generally the subject of such contracts of security. They have been held to be valid when free from fraud toward third persons and free from usury toward the borrower or debtor in the transaction. They are not sales because they do not transfer the title or fee; they are not pledges or pawns because they affect real estate; or antichreses because possession remains in the debtor; and they are not mortgages because in the Civil law the title of the property mortgaged remains in the mortgageor, and not even a legal or conditional title passes to the mortgagee.

115. The pact or right of redemption in the contract of sale of the Civil law is not the same thing as the equity of redemption in the mortgage of the Common law. The Civil Code of Louisiana and the Code Napoleon define it in these terms: "The right of redemption is an agreement or paction by which the vendor reserves to himself the power of taking back

the thing sold by retaining the price paid for it." The term fixed for the redemption can not exceed ten years in Louisiana and five years in France. The delay once expired, if the vendor has not exercised his right, the purchaser becomes irrevocably the owner of the property. He has not got to put the vendor in default, or to have his title recognized or decreed by any court of justice; nor has the vendor, after the expiration of the term, any claim or equity of redemption. The purchaser becomes *ipso facto* absolute owner. *

Therefore, though there is some analogy between the Civil law sale with right of redemption and the Common law mortgage with the equity of redemption, they are clearly distinct from each other. In the latter case the legal title only passes at first to the mortgagee under a condition, but not the *fee*, though it may follow later. In the former case, the *fee* itself passes to the purchaser *at once* subject to the resolutive condition by which it may be returned to the vendor. We have no reasons to follow the effects of this difference between the two systems. My only object is to put the law student on his guard against a natural tendency to confound the two subjects, and show to him the true nature of the Civil law sale with right of redemption. †

* Civil Code of Louisiana, Arts. 2567-8, 2570.

Code Napoleon. Arts. 1659, 1660, 1662.

Troplong, Vente, Vol. 2, Sec. 713.

Laurent, Vente, Secs. 396, 397.

Duranton, Vol. 16, Secs. 401, 402.

Merlin, Répertoire, *Verbo* Pignoratif.

† Miller vs. Shotwell, 38 La. An. 890.

116. It is not uncommon, in countries of the Civil law, for parties to a contract of loan of money, to use the form of a sale with the right of redemption and disguise thereby the loan and pignorative contract. The sale in that case is necessarily a simulation, ostensibly transferring the ownership of the property, but in reality only securing the creditor. Yet, simulated conveyances are legal and permissible when not fraudulent. Consequently such contracts of security under the garb of a sale may be valid, though to be looked upon with suspicion. But they can operate, as intended by the parties, to secure the creditor, only so far as the parties themselves are concerned. They can not affect third persons or other creditors; they can not give or create any right of preference, and act as either pledges or mortgages.

117. Merlin says of those pignorative contracts: "It is a sort of sale which a debtor makes of his property, with the stipulation that the vendor shall have the right to take it back during a certain time, and that he will retain the possession under a lease, in consideration of a sum of money, which is ordinarily equal to the interest of the amount loaned and for which the sale has been made."*

This contract is called *pignorative*, because it only contains a simulated sale, and that its true object is to give the property in pledge to the creditor, and to procure to him the interest on a loan, in disguising the same under a different name. The modern Civil

* Merlin, Repertoire. *Verbo* Pignoratif.

law and the Common law of old equally admit that kind of contracts, provided they are not fraudulent.

117. Troplong, with his usual precision of language, speaks of the pignorative contract in the following terms: "You must not confound the sale under the right of redemption with the pignorative contract, which is nothing but a disguised contract of loan. It is true that the latter contains a sale with right of redemption; but it is complicated with two other aggravating circumstances which give it a usurious character, to-wit: the smallness of the price and the relocation of the property to the vendor for the time fixed for the redemption. The circumstance of relocation is especially significant and decisive. It demonstrates the simulation to which the parties have resorted. It takes away every feature of alienation, and consequently of sale, to an agreement by which the purchaser is not put in possession, leaves the vendor in the enjoyment of the property and reserves to him a way to resume the ownership of it."*

118. Inasmuch as the intention of the parties in this contract and the object of the contract itself, when it is a disguised loan, is only to simulate a sale, and, in reality, to leave the ownership in the vendor, their relations are those of debtor and creditor, and not of vendor and purchaser, and are, therefore, governed by the principles of the contract of loan, and not by those of contract of sale. Consequently, if the property is destroyed or damaged, whether in the hands of the

* Troplong, Vente, Vol. 2, Sec. 695.

vendor or the purchaser, the loss is for the account of the borrower and he remains a debtor, as in the case of the pledge or mortgage, when the thing pledged or mortgaged perishes during the existence of the debt.

Another important consequence of the disguised loan is that the property does not belong to the purchaser at the expiration of the time fixed for the redemption, as it does when the sale with the right of redemption is in reality a sale and not a disguised loan. The pact, in the case of the loan, could not be enforced by the creditor, because it would be nothing else than the *lex commissoria* in the pledge, the forbidden stipulation that the thing pledged will become the property of the pledgee in default of payment.*

119. The jurisprudence of Louisiana where the use of the pignorative contract is not of rare occurrence has been fixed in the same sense. The Court there said: “Hence it is that when the price is inadequate and possession has not been delivered to the purchaser, but was retained by the vendor, it has uniformly been considered and held that the transaction was not a sale but a mere security,—indeed, a sort of *pignorative* contract upon which the law looks with suspicion, for the protection of the embarrassed and unfortunate debtor against the rapacity of his ravenous creditor. Indeed the settled doctrine of this court on this sub-

* Laurent, Droit Civil, Vol. 28, Sec. 380.
Duranton, Droit Civil, Vol. 16, Secs. 391-392.
Rogron, Code Civil, Art. 1659, p. 2184.
Sirey, 43, II, 32.
Id., 74, I, 72.
Dalloz. 32, 2, 153.

ject is that redeemable sales, unaccompanied by delivery of the thing sold, of which the considerations are inadequate, will be treated by courts without sufficient evidence to the contrary, as contracts for which the thing *nominally* sold stands as *security*, and nothing else." *

120. We may conclude from those principles that when the sale with right of redemption is a simulation and a disguised loan, the lender acquires thereby, even when the transaction is lawful, no right of preference, privilege or lien, over the property or its proceeds, against the other creditors of the borrower, and that they can treat the property as still belonging to their debtor, and, therefore, seize or attach it in the hands of the apparent vendor. It seems clear that rights of preference, priority, privilege or lien, over the property of a common debtor, in favor of one creditor against other creditors, are created either by contracts or by the law. The contracts of pledge and mortgage are the only ones, at least under the Civil law, by which a debtor can give such rights of preference, and we have seen that the simulated sale in question is neither a pledge nor a mortgage. The rights of preference, or liens, created by the law are those specially and specifically designated by statute,

* Baker vs. Smith, 44 La. An. 929.
Howe vs. Powell, 40 La. An. 308.
Lawler & Huch vs. Cosgroves, 39 La. An. 488.
Miller vs. Shotwell, 38 La. An. 891.
Ware vs. Morris, 23 La. An. 665.
LeBlanc vs. Bouchereau, 16 La. An. 11.
Collins vs. Pellerin, 5 La. An. 99.
Jackson vs. Lemle, 35 La. An. 855.

and they are *stricti juris*. The law clearly gives no lien to the simulated purchaser over the property, as against the other creditors of the simulated vendor. These remarks do not apply to the Common law and its doctrine of liens in equity.

121. The contract of security in question, a hybrid transaction, ostensibly translativ of property, pignorative in reality, suspicious to the courts, savoring of usury, would probably be less resorted to by lenders of money if they realized that it secures them against the just complaints of neither the debtor nor his other creditors.

There seems to be no question that when the parties, for the purpose of securing a loan, adopt the form of a sale without delivery to the creditor, the latter, even if the contract is free of fraud, acquires no privilege or preference over the property against third persons.*

* Baudry-Lacantinerie, Nantissement, p. 62.
Duranton, Vol. 18, No. 538.
Aubry et Rau, Vol. 4, p. 703, Sec. 432.
Laurent, Vol. 28, Nos. 488 and 489.

CHAPTER IX.

DELIVERY AND POSSESSION OF THE PLEDGE.

122. The pledgee must receive and retain possession of the thing pledged in order to render his lien and rights effective against third persons. The object of the law is that, by the possession of the pledgee, third persons dealing with the pledgor should be informed and warned that they can not look to the thing pledged as being any longer part of the active assets of the pledgor. That possession must, therefore, be ostensible, not ambiguous, and must receive a certain publicity or notoriety.

The Court of Cassation, in France, said on this point: "It is of the essence of the contract of pledge, that the delivery of possession to the creditor should be an ostensible fact, of a sufficient notoriety to warn third persons that the debtor is dispossessed of the thing pledged and that it is no longer part of his unencumbered property."*

Troplong says forcibly: "We say then two things: it is that the debtor must dispossess himself, and furthermore, he must dispossess himself ostensibly, frankly, without evasion and without deceptive combinations which lead third persons into error as to the real possessor of the thing."†

* Laurent, Vol. 28, Sec. 471, p. 464.

† Troplong, Nantissement, Sec. 298, p. 293.

Dalloz, 1876, 1, 219.

Baudry-Lacantinerie, Nantissement, Vol. 1, p. 47.

123. The Court of Louisiana has stated the same principle in emphatic terms. It said: "The privilege of pledge is subject to unbending conditions. There must be an actual delivery in order that those who transact with the pledgeor may know that the property is held in pledge. There should be no good reason to consider the thing pledged in the possession of the pledgeor for his account and benefit. The possession of the pledgee should be real and effective at all times. It must be apparent and well known. It is essential to complete a real right to movables. This possession should not be equivocal and so placed as to deceive other creditors and lead them to believe that the debtor always continued the possession." *

The facts of this case were briefly as follows: The owner of a steamboat in Louisiana, by a deed of chattel mortgage passed in New York, mortgaged her to a bank of New York. The chattel mortgage is unknown to the Louisiana law, where only real estate may be mortgaged. But the deed of chattel mortgage in this instance containing all the elements of a pledge under the laws of Louisiana, the Court of that State recognized its validity as such. The boat in point of fact had remained in the possession of the owner and mortgageor or pledgeor, who agreed with his creditor, the New York bank, to hold her for its account and as its agent, and to lease her and account

* Bank vs. Janin, 46 La. An. 1001.

for the rent. He did lease her, but did not so inform the bank, nor did he account for the rent money.

The lessee sublet the boat to a sublessee, who was notified by the bank's counsel that the boat had been in possession of the owner and pledgeor as agent of the pledgee, and that the sublessee should thereafter hold her for account of the bank. In the meantime another creditor of the owner, under a judgment for debt, caused the boat to be seized by the sheriff and sold. The New York bank intervened and claimed the proceeds by virtue of its pledge. The sole issue between the contending creditors was that of possession *vel non* in the pledgee, such as to render the pledge effective against third persons. The court held that, under the circumstances of the case, the bank of New York, the mortgagee or pledgee, did not have such possession.

124. Another case, also recently decided by the court of Louisiana, shows clearly the necessity of unequivocal delivery and possession to the pledgee, or to a third person for account of the pledgee, agreed upon by the parties. In this case a commission merchant in New Orleans, by agreement with one of his creditors, in order to secure him by a pledge, executed his promissory note in favor of the creditor, attached to it certain bonds and certificates of stock, placed the note and securities in a package with the creditor's name on it, put the package in his (the merchant's) box in bank, instructed his clerk, who held the key of the box, to deliver the package on demand of the creditor

whenever called upon to do so, and communicated these instructions to the creditor. The package remained in the box in bank until the pledgeor's death. The pledgee then claimed against other creditors of the deceased merchant, that the securities in the package bearing his name were pledged to him according to law, and that, delivery and possession had been made for his account to the clerk of the merchant. It was held, adversely to the contention of the pledgee, that there had never been such dispossession of the pledgeor, and such delivery and possession in the pledgee, as could affect third persons. The case was hotly contested and was decided by a divided Court, on a rehearing, in which the Court reversed its former judgment, which had been in favor of the pledgee. The decision rested principally on the principle that the clerk of the pledgeor had never had possession of the securities as agent of the pledgee, but had held them altogether as agent of the pledgeor, who never lost his control of them.*

125. The Supreme Court of the United States, in a leading case coming up from Louisiana, recognized and applied the same principles, and declared the pledge of securities which had remained under the control of the pledgeor of no effect so far as his other creditors were concerned. The rule that the possession of the pledgee must not be ambiguous or equivocal was there very clearly shown. The late Justice Bradley, in a masterly opinion, expounded in that

* Succession of Lanaux, 46 La. An. 1036.

case with great learning and ability the Roman, the French, the Louisianian and the Common law of pledge. Nowhere, perhaps, did that eminent jurist show his knowledge of the Civil law more conspicuously. The facts of this case had some analogy with those of the Succession of Lanaux in this, that the securities which formed the subject of the pledge were placed in an envelope by the pledgeor and delivered for safe keeping to his clerk for account of the pledgee, but remained subject to the control and disposal of the pledgeor. The case turned and was decided upon the same principle that the possession of the pledgee must be certain and not ambiguous and equivocal.*

126. The rule that the possession of the pledgee must not be ambiguous is so stringent that in a case in which the debtor, for the purpose of securing the payment of a loan of money made by sundry advances, agreed to give his creditor the entire management and control of a steamship, with the right and authority to employ all the officers and crew necessary to run her for six months, and to hold her as security until the loan was reimbursed, the Court of Louisiana decided that the contract did not constitute a pledge, and that the creditor was not entitled to a privilege or preference in competing with other creditors. The decision is not convincing, and the court was satisfied with the statement that such an agreement could not be construed as a pledge. But, evidently, the conclusion

* Casey vs. Cavaroc, 96 U. S. 467.

was drawn from the fact that the creditor was not in possession of the vessel though he had control of her.*

127. Still it is perfectly well established, both in the Civil and the Common law, that delivery of the pledge and possession thereof may be given to a third person for account of the pledgee by agreement between the parties and the third person, chosen by both pledgeor and pledgee. We must observe in that case that the third person must accept the charge in order to validate the contract of pledge. There must be between him and the parties to the pledge a juridical obligation, without which there would be no proper delivery to the pledgee, no proper possession by him and, therefore, no legal pledge.†

And the rule is carried still further and will permit the pledgeor himself to be, to a certain extent, for a special purpose, the possessor or detainer *ad hoc* of the pledge for account of the pledgee. But in such cases the possession or detention of the thing pledged by the pledgeor must be very clearly for the benefit of the pledgee.

There must not be any double dealing, or even the suspicion of double dealing, between pledgeor and pledgee, under penalty of nullity of the pledge. The

* Wickham vs. Levistones, 11 La. An. 702.

† Baudry-Lacantinerie, Nantissement, Sec. 85.

Troplong, Nantissement, Sec. 345.

Laurent, Nantissement, Sec. 484.

Code Napoleon, Art. 2076.

Civil Code of Louisiana, Art. 3162.

Woodward vs. Railroad Company, 39 La. An. 566.

Jones, on Pledges, Sec. 34.

Schouler, on Bailments, p. 181.

principle is clear and of easy comprehension, but in its application it often presents great difficulties. Each case has to be decided according to its own facts. It is not the understanding of the parties, even in good faith, that will validate a pledge in which the thing pledged remains in possession of the pledgeor, or is placed in that of a third person, for account of the pledgee. *In point of fact*, such possession must be for the benefit of the pledgee.

As the object of the law is to protect other creditors of the pledgeor by dispossessing him as well as by possessing the pledgee, it is evident that the rule would be of no avail if, by mere agreement, and with no benefit to the pledgee, and no deprivation to the pledgeor, the pledge was left in the latter's hands. Hence the numerous cases in which pledges were declared null and void on that ground.

128. We must make, however, a very great difference between the possession of a third person for account of the pledgee and the possession of the pledgeor himself, also for account of the pledgee.

The possession of the third person may be for the whole time of the pledge and for the sole purpose of holding it for the pledgee. But that of the pledgeor must be for a special purpose and only for the time necessary for that purpose.

Troplong gives the instance of a pledge of sparkling wines, which required special care and treatment, and which, for that reason, were confided at times to the handling of the pledgeor. This did not affect the

validity of the pledge. That writer remarks: "We may even say, in a general way, that whenever the assistance of the pledgeor is necessary for the betterment of the thing pledged, it must be permitted, on condition, however, that it should not in any manner impair the possession of the pledgee."*

129. In another instance in which wines of the same kind were pledged with the understanding that they would remain in the stores of the pledgeor for the purpose of being taken care of and *treated or nursed* by him, the pledge was declared null by the French courts on the ground that the pledgeor had remained in possession of the wines and that they had not been separated from his other goods. It is clear that the question of possession in all such cases is one of fact to be decided by the court or the jury on the evidence, and for the decision of which no fixed rule can be established. †

130. Again, it may be stipulated in the contract of pledge that the pledgeor shall have the right to attend himself to the sale of the goods pledged and delivered to the pledgee, or stored for his account in a public warehouse. It is presumable in such cases that the owner and pledgeor can obtain a better price for the goods than the creditor. ‡

* Troplong, Nantissement, Secs. 311, 312, 313, 314.

Laurent, Vol. 28, Sec. 374.

Jones, on Pledges, Sec. 44.

Schouler, on Bailments, p. 181.

† Baudry-Lacantinerie, Nantissement, Sec. 69.

‡ Troplong, Nantissement, p. 307.

The rule is the same on all this subject in the Civil law and the Common law.*

131. The Court of Louisiana has established the same jurisprudence, but perhaps carried the principle too far. In a case of the pledge of certain machinery, the clerk of the pledgeor was constituted the agent of the pledgee to hold possession of the machinery. With the consent of the pledgee the pledgeor was permitted to use the machinery at times in their business. It was contended by other creditors of the pledgeor that the pledgee's possession was not such as to make the pledge valid against them. The Court held that it was. It said: "The possession of the property by the pledgee, as shown, was sufficient. C. C. 3162; *Weems vs. Moss Company*, 33 An. 973. In fact, the property pledged may be left in the possession of the debtor himself, provided his possession is precarious and clearly for account of the creditor. *Conger vs. City*, 32 An. 1250." †

In the case of *Weems vs. Moss Company*, cited by the Court, the pledge had been placed also in the hands of an employee of the pledgeor, but for account of the pledgee, and the Court held that the pledgeor was therefore sufficiently dispossessed to render the pledge effective against third persons.

132. We must observe, however, that, notwithstand-

* Jones, on Pledges, Secs. 43 and 44.

Casey vs. Cavaroc, 96 U. S. 467.

Hilliker vs. Kuhn, 71 Cal. 214.

Schouler, on Bailments, pp. 181, 182.

† Jacquet vs. His Creditors, 38 La. An. 866.

ing these declarations of the Court of Louisiana that the pledgor himself may be directly the detainer *ad hoc* of the pledge for account of the pledgee, there is no case in the Louisiana Reports where this was actually decreed. The only case in which the pledgor remained the possessor, that of Conger vs. City of New Orleans, also cited by the Court in Jacquet vs. His Creditors, was one of a statutory, not contractual, pledge, and was decided on other grounds.

In the two cases of Jacquet vs. His Creditors, and Weems vs. Moss Company, in which the Court decreed the validity of pledges in which the clerk of the pledgor had been the detainer of the property pledged for account of the pledgee, there was clearly a departure from the principle so well established, that the possession of the pledgee must not be *uncertain or equivocal*. The same Court had, in its earlier jurisprudence, applied the rule with rigor in a case in which the pledgor had kept the goods pledged on storage in his own stores, though for account of the pledgee, to whom he had given his receipt for the goods. The pledge was held invalid on account of the character of the possession.* It is well for the sake of its own jurisprudence that the Court of Louisiana in its latest decisions, as shown by the two cases cited above, of Bank vs. Janin and Succession of Lanaux, has returned to the sound doctrine on this subject.

133. As far as we could ascertain it, all the Com-

* Geddes vs. Bennett, 6 La. An. 516.

mon law cases in which the validity of the pledge was maintained against other creditors, though the pledgeor had possession of the pledge, were cases in which his possession was for a specific purpose and, consequently, of limited duration, such as for the collection of promissory notes, bills or other securities, or for purposes of that sort. But I do not think that a pledge was ever recognized valid against third persons by the courts of either the Civil or the Common law, when the pledgeor retained possession of the pledge indefinitely and for no special reason and benefit to pledgee, only holding it for account of the pledgee, even when there was no fraud or imposition in the case. Such a rule would clearly be the reversal and destruction of the fundamental principle that the pledgee must have possession of the pledge. It would be, in fact, permitting the parties to make a law of pledge to themselves, leaving the thing pledged altogether in the hands of the debtor and thereby deceiving and injuring third persons. As was well said by Justice Bradley, in *Casey vs. Cavaroc*: "Bad faith would defeat the pledge though the creditor had possession. But want of possession is equally fatal, though both parties may have acted in good faith. Both are necessary to constitute a good pledge, so as to raise a privilege against third persons" (96 U. S., page 490).

134. The fundamental rule of the law of pledge that, for the validity of the contract, there must be a delivery of the thing to the pledgee, and that he must preserve and retain the possession of it as long

as his debt is not paid and the contract lasts, that rule belongs equally to the Civil and the Common law, and is of the essence of the pledge under both systems of law.*

135. In the old Roman law, the pledgee after receiving possession of the pledge, could legally return it to the pledgor, to be used by him, either for a consideration or as a gratuity; and that did not impair the validity of the pledge. But such is not, clearly, the modern law of either England or the United States, or the countries of the Civil law.†

* *Nisbit vs. Trust Company*, 4 Woods. 470.
Trust Company vs. Trumbull, 137 Ill. 146.
Bank vs. Harkness (W. Va.), 24 S. E. 548.
Abbott vs. Goodwin, 20 Me. 411.
Sumner vs. Hamlet, 12 Pick. 76.
Combs vs. Tutchelt, 24 Minn. 423.
Allen vs. Smith, 10 Mass. 308.
Hilliken vs. Kuhn, 71 Cal. 214.
Casey vs. Cavaroe, 96 U. S. 467.
Caperton vs. McComick (Miss.), 22 S. R. 60.
Jones, on Pledges, Sec. 23 *et seq.*
Story, on Pledges, Sec. 297.

† *Pandectes of Pothier*, Vol. 7, p. 360.

CHAPTER X.

136. It is indispensable for the validity of the pledge that the pledgee should have possession of the thing pledged, but the law does not fix or specify the time when such possession should begin. The pledgee may have had possession before the contract of pledge was entered into and, in that case, the possession continues; or the pledgee may only receive possession some time after the contract and, in that case, the pledge is vivified from the moment of possession.*

The tie between the debt and the pledge does not depend upon the time at which possession of the thing pledged was given. Whether the debt is anterior to the pledge, and the latter only given afterward; or whether the pledge was given at the same moment that the loan was made; or whether the pledge was delivered first and the money loaned later; it is of no consequence. What is to be considered is that the pledge was given in view of the sum paid or to be paid; and that the parties meant that it should secure it. The Roman law provided that the pledge could be given either for a contract then being entered into, or for one already formed. As said by Marcianus: "*Et sine in præsenti contractu, sine etiam præcedat.*"†

* Laurent, Droit Civil, Vol. 28, Secs. 480, 467.

Jones, on Pledges, Secs. 38, 39.

Baudry-Lacantinerie, Nantissement, Sec. 69.

Court of Cassation, 23d December, 1879, Journal du Palais, 1881.

† Troplong, Nantissement, Secs. 217, 274.

137. This principle does not seem to have been acknowledged by the Court of Mississippi in the recent case of *Carpenter vs. McCormick*, reported in the *Southern Reporter*, Vol. 22, p. 60. McCormick had loaned to the American Cooperage Company the sum of \$10,000, and taken as security therefor a pledge of certain cooperage material upon the grounds of the company. To render the pledge valid and effective, the parties agreed that a portion of the land of the company should be leased to him; that some \$12,000 worth of material should be placed thereon, with some distinctive mark on it, and be left in possession of one Hayne as the agent of McCormick; that said Hayne was instructed that whenever and as often as any of said property should be used or removed by the company, Hayne should see that an amount of property of the same kind and value should be substituted for the property so taken; that the substituted property should be placed in the same location and be marked with the same mark as the property removed. The Court decided that the pledge was invalid, owing to the equivocal character of the possession, and reversed the judgment of the Chancellor, who had decreed the pledge valid.

The decision of the Court of Mississippi seems to rest upon the fact that the pledgeor had the power to substitute other and new articles to those originally pledged. The Court cites several cases to support its position, in which it says *there was no substitution*. But it does not cite any case in which it is held that

the substitution of a new thing to that originally pledged invalidates the contract and shows the pledgee's possession to be equivocal. The substitution of the new thing to the old is not prohibited in the contract of pledge. It may create a new pledge, or it may be the delivery of the thing pledged to secure a debt already existing; or it may be the performance of a promise to deliver the thing pledged under the terms of a previous contract. But be it what it may, the moment the new thing is placed in the hands of the pledgee or his agent his right of preference over it attaches and the contract is vivified. There seems to be nothing in such an agreement to characterize the pledgee's possession as equivocal. Indeed, it is a common transaction and mode of pledge now of daily occurrence for bankers or capitalists to make advances or loans of money, or to grant open credits on collateral securities to borrowers who stipulate that they may during the existence of the pledge substitute other or new securities to the original ones to the satisfaction of the pledgees. This agreement clearly does not affect the character of their possession and impair the validity of the pledge.

138. We should note that in the cases in which the pledge was declared null on account of the substitution, it was because the thing substituted was not in the possession of the pledgee.

If the pledge was null because the pledgee had not possession of the thing pledged at the moment of the

substitution, it is the pledge of *that* thing which was null. The pledge of the thing *substituted* can not be null for want of *possession* in the pledgee if the thing is then *actually* in his possession.

It is not the power of substitution of the thing pledged which could invalidate the pledge. It is the power of *disposition* of that thing reserved in the contract by the pledgeor. It is of the essence of the pledge that the debtor should be dispossessed of the thing pledged; that the creditor should be possessed of it, and that the former should have no further control or disposition of it. Consequently, if the pledge remains in the hands of the pledgeor, though for account of the pledgee, and with the understanding that the former has the right to substitute, in his own hands, other securities to the original ones, it is clear that he has the right and power of disposition of the thing pledged, and, therefore, that the pledge is invalid. This is what was decided by the Supreme Court of the United States in the case already alluded to and so often cited as authority, of *Casey vs. Cavaroc*, 96 U. S. 467.

139. The Court states the substance of the case in these words: "Was there such a delivery and retention of the collateral securities as to constitute a valid pledge by the law of Louisiana? Clearly they were never out of the possession of the officers of the bank (the pledgeor) and were never out of the bank for a single moment, but were always subject to its disposal in any manner whatever, whether by collection, renewal,

substitution or exchange ; and collections, when made, were made for the benefit of the bank and not that of the *Crédit Mobilier* (the pledgee).''

And further : " Whether constructive possession in the creditor can be affirmed, where an article to which his only title is that of pledge is actually re-delivered to the debtor, with general authority to dispose of it and substitute another article of equal value in its place, is the question we have to meet in this case."

After reviewing both the Civil law and the Common law authorities the Court concludes : " On this ground, therefore, of want of possession in the pledgee, or of a third person agreed upon by the parties, and of actual possession and control in the pledgeor, we feel compelled to hold that the *Crédit Mobilier* (the pledgee) had no privilege as to third persons, and that the receiver was entitled to the securities in question."

140. It is evident that the case was decided adversely to the pledgee only because the pledgeor had the control and power of disposition of the collateral securities, which had remained in his hands ; and not because he could substitute other securities to the original ones, if those had been in the possession of the pledgee. This distinction is of the greatest importance in the pledges securing open credits, in which the debtor reserves the right to make the substitution. Such cases do not come under the ruling of *Casey vs. Cavaroc*. In these, the thing pledged is in the hands of the creditor when the debtor offers the new securities and makes the substitution. The new securities

pass at once into the hands of the creditor. The transaction does not, in any manner, affect or impair the validity of the pledge; because the dispossession of the pledgeor and the possession of the pledgee have never been interrupted, though the thing pledged is changed by the exchange.

The learned judge of the Circuit Court who decided the case of *Casey vs. Cavaroc* said emphatically that the exchange or substitution of the securities could not invalidate the pledge, and remarks "that the case of *Clark, Assignee, vs. Iselin*, 21 Wall. 360, is a pointed authority to sustain the negative of this proposition (the impairment of the pledge by the substitution), and settles this objection to the title of defendant conclusively against complainant." 2 Woods, 87.

141. In *Clark, Assignee, vs. Iselin*, the Supreme Court of the United States decided directly that the substitution of securities did not impair the pledge.

142. The rule that the validity of the pledge does not depend upon the time that possession is given to the pledgee; that such possession may be given at any time thereafter (except in case of insolvency of the pledgeor), and that the right of preference springs from the possession whenever given; that rule is part of the Common law as well as of the Civil law. The Court of New York so held in the case of *Parshall et al. vs. Eggert*, 54 N. Y. 23. The judge said on this point: "I know of no authority denying the right of a party who has a contract of pledge, ineffectual for want of delivery, to obtain a delivery at a sub-

sequent time, and thus to validate the pledge. Upon general principles the only obstacle which can prevent such a transaction from being effectual must be the intervention of fraud.”*

143. If the pledgee had possession of the thing pledged before or at the time that the contract was entered into, there is no necessity of a delivery of the pledge by the pledgeor. Such is the case if the pledgee had it by virtue of a loan, or hire, or deposit. The nature of his possession changes necessarily, but the possession continues under the pledge. The principle applies also to the case of a broker who buys stock for his customer on speculation, paying for it with his own funds. Either by agreement or by the Common law, the relation of pledgeor and pledgee arises in such a case. The possession of the broker is that of a pledgee, though he has not received it from the customer, who never was put in possession of the stock.†

144. The delivery and possession of the thing pledged may be symbolical or fictitious in certain cases. And it may be so both in the pledge of incorporeal and of certain corporeal things. Of the latter class, goods or merchandise deposited in stores or warehouses when pledged are delivered and possession

* Jones, on Pledges, Sec. 39.

Boynton vs. Payroux, 67 Me. 587.

Fenby vs. Pritchard, 2 Sandf. (N. Y.) 151.

Hilton vs. Tucker, L. R. Chancery Division, 1888, p. 669.

Story, on Pledges, Sec. 300.

† Civil Code of Louisiana, Art. 3152.

Jones, on Pledges, Sec. 25.

Edwards, on Bailments, Sec. 219, p. 170.

Baudry-Lacantinerie, Nantissement, Sec. 69, p. 48.

Markham vs. Jaudon, 41 N. Y. 235.

Baker vs. Drake, 53 N. Y. An. 211.

Gruman vs. Smith, 81 N. Y. 25.

Gillet vs. Whitney, 120 N. Y. 402.

of them given to the pledgee by delivery to him of the keys of the store, if the goods are in a private store, or by assignment of the warehouse receipt, if the goods are deposited in a public warehouse. In the same manner the delivery of merchandise on board ship, when pledged, is made by the transfer or assignment of the bill of lading which covers them.*

145. Under a statute by virtue of which a pledge of goods is created in favor of the consignee for money due him by the consignor, the moment the bill of lading is deposited in the postoffice, or handed to the common carrier for transmission, it was held that the unpaid vendor of the goods could not compete with such consignee, and that the latter's privilege was paramount to the vendor's lien. The delivery of the pledge is made by the special provisions of the statute to consist in the mailing of the bill of lading, or the placing of it in the hands of the common carrier for transmission to the consignee.†

146. Some writers say that, in such cases, the keys of the store, the warehouse receipts and the bills of lading are the symbols of the goods, and that, by delivering the symbols of the pledge, the pledge itself is delivered and possession of the goods thereby given to the pledgee.‡

Mr. Jones says in this respect: "Such bills or receipts represent the goods themselves, and the delivery of such bills or receipts as collateral security

* Baudry-Lacantinerie, *Nantissement*, p. 47.

Pont, *Nantissement*, No. 1125.

† *Florsheim Bros. vs. Howell, Phelps & Co.*, 33 La. An. 1184.

‡ Jones, on Pledges, Secs. 36, 37, 227, 228, 229.

generally amounts to a symbolical delivery in pledge of the goods themselves.”

147. Troplong does not concur in this view of the subject and gives a more logical and philosophical reason for the principle. He speaks in these terms :

“ In possessing the keys, one possesses the goods, not because the keys represent the goods and are a symbol of them, but because the keys place the goods in the hands of the possessor, in such a way that he alone can dispose of them, and that anybody else could only do so burglariously. Such is equally the part that a bill of lading plays. It puts the goods at the disposition of the consignee ; it gives to him alone the right to receive them ; it causes him to hold them if not corporeally, at least virtually.”*

Ducaurroy criticises also the idea of the symbolical delivery by delivery of the keys of a store in which the goods sold or pledged are contained, and he remarks that a key does not represent wine, or wheat, or other merchandise.†

148. But the principle that, for the pledge of goods in a store or warehouse, the delivery of the keys of the building to the pledgee is a legal and sufficient delivery and possession of the goods, has been adopted by the Common law and the Civil law.‡

* Troplong, *Nantissement*, Secs. 323, 324.

Baudry-Lacantinerie, *Nantissement*, p. 47.

† Ducaurroy, *Instituts Expliqués*, Vol. 1. Sec. 403.

‡ Story, on *Bailments*, Sec. 297.

Schouler, on *Bailments*, Sec. 189.

Am. and Eng. *Ency. of Law*, *Verbo* Pledge, p. 595.

Hilton vs. Tucker, L. R. Chancery Division. 1888, p. 669.

Baudry-Lacantinerie, *Nantissement*, p. 47.

Troplong, *Nantissement*, Secs. 323, 324.

Duranton, *Nantissement*, Sec. 531.

Pont, *Nantissement*, p. 617.

Yet this doctrine is subject to contestation, and some writers say that this principle, if well established, in theory, presents difficulties in its application. The possession of the pledgee must be *exclusive*, whether it is actual or constructive. What then if the pledgeor has a double key, or a double set of keys of the store? He is then himself as well in possession of the goods as the pledgee, and can dispose of them. If the latter has knowledge of this, or consents to it, the pledge is clearly invalid. Furthermore, the possession of the pledgee and dispossession of the pledgeor must be ostensibly visible to third parties dealing with the latter. It is not so when the goods are still in the store of the pledgeor, though the keys may be in the hands of the creditor. Third persons are not necessarily aware of this fact.

149. Laurent does not favor the doctrine and argues strongly against it, as follows: "According to Art. 1606 the delivery of movable property is effected by the delivery of the keys of the building which contains it. Does this suffice for the pledgee to be put in possession, and, consequently, that he should be privileged against third persons? The authors say so. Is not this doctrine too absolute? The delivery of the keys by itself indicates no change of possession; it has no notoriety; it does not warn third persons; consequently there has been no putting in possession in the sense of Art. 2076. These are decisions in the adverse sense. The Court of Aix has recognized the privilege of the pledgee to whom the keys of the store had been delivered. But we can

see by the facts of the case how easy fraud may be committed in such cases. The debtor had granted a second pledge on the same goods in delivering the keys to the second pledgee, who thereby was deceived. Does not this facility to deceive third persons by delivering the keys to them prove that this fact alone is not sufficient to constitute possession in favor of the pledgee? In our opinion it would be necessary that other facts should accompany the delivery of the keys in order to give to the possession a public character.' '*

150. Laurent might have cited in support of his opinion the case of the Bank of Martinique vs. Thomas, Lachambre & Co., in which the French Court of Appeal held exactly the same position and decided that a pledge of goods was invalid because they had remained in the store of the pledgeor, though the keys of the store were delivered to the pledgee. The Court expressed the same views as Laurent and said that such a contract is *occult*; that third persons are not thereby put on their guard in dealing with the pledgeor, whilst the law demands that the dispossession of the debtor should be ostensible.†

151. The delivery and possession of corporeal property to the pledgee may be constructive, and thereby sufficient, in some cases where the thing pledged is not contained in a building, or is of too great size

* Laurent, Du Gage, Sec. 473.

† Journal du Palais, 1871. p. 145.

and weight to be moved without trouble and expense. Thus, it was held by American courts that logs in a boom, or timber or lumber in a pile, may be pledged by the pledgeor's pointing them out to the pledgee and declaring that he gives him possession of them.*

This principle was equally acknowledged by the French courts in cases of the pledge of lumber, but in those cases the pledgee had put his mark upon the lumber in taking possession.†

The rule is the same under the Civil and the Common law.

152. The same rule should apply to such articles as bales of cotton, hogsheads of sugar, casks of wine, barrels of flour, etc., when lying on the quays, or levees, or streets, before shipment, or after delivery and before storing. Such goods could be pledged, whilst thus lying out, and possession given to the pledgee by the pledgeor's pointing them out and declaring that he delivers them to the pledgee. But it would be safer for the latter to put his mark upon them and thus perfect his constructive possession, as was done in the cases in which the French Courts acknowledged the legality of the pledge of lumber under analogous circumstances.‡

* Jones, on Pledges, Sec. 36.

Am. and Eng. Encyc. of Law, *Verbo* Pledge, p. 595.

Jewett vs. Warren, 12 Mass. 300.

Nevan vs. Roup, 8 Iowa, 207.

Whitney vs. Tibbetts, 17 Wis. 359.

† Pont. Nantissement, Sec. 1130.

Dalloz, 28, 1, 90.

‡ Lawson, on Bailments, Sec. 51.

CHAPTER XI.

153. We have seen already how the delivery of incorporeal things is made and possession of them given to the pledgee; and we have noted, on this point, the contrast between the Civil law and the Common law. In both systems the delivery is made by delivery of the *title*, or muniment of title, of the incorporeal thing or right, to the pledgee. In the Common law this alone constitutes the possession of the pledgee, even against third persons; and in case the pledgeor has made a transfer of the same things to two or more persons, the first transferee in point of date is considered entitled to the thing pledged.*

In the Civil law, so far as third persons are concerned, the transfer of the right and delivery of the deed or title are not sufficient to entitle the pledgee to the thing or credit pledged: the pledgee must moreover notify the debtor of the credit, of the transfer. It is this notification which constitutes the possession of the pledgee. So that, if the pledgeor makes a second transfer to another creditor before the first pledgee has given notice to the debtor of the credit, and the second transferee does give the notice first, he is entitled to the credit given in pledge, and the pledge of the first pledgee is fruitless.†

* *Ante*, Secs. 11. 18.

† *Ante*, Sec. 11 *et seq.*

Lee vs. Bradley, 8 La. M. 57.

Winchester vs. Ory, 17 La. 428.

Deloach vs. Jones, 18 La. 453.

Lallande vs. Ingram, 19 La. An. 364.

Troplong, Nantissement, Sec. 266.

The difference between the two systems of law is also remarkable in this, that in the Civil law, if the right or credit transferred is not evidenced by title, and it is transferred successively to two or more persons, it is the last transferee who is considered entitled to the right or credit transferred.*

154. This rule applies only to the transfer and pledge of claims and credits. There can be no notice of transfer of incorporeal things which are not credits, as, for instance, patents for invention. And this is the reason for which the pledge of such things has been declared valid, as of incorporeal things, without notice of the same to anybody.†

A consequence of the principle that in the pledge of rights or claims, the title or muniment of title must be delivered to the pledgee, is that such rights or claims as are not evidenced or represented by title can not be pledged, inasmuch as the delivery of the title in such cases constitutes the dispossession of the pledgeor and the possession of the pledgee. “When a credit is without muniment of title, it can not be the object of a legal pledge. How could the delivery of it be made? And when there is neither delivery nor possibility of delivery, how could the pledge be made?” ‡

* Pothier, *De la Vente*, No. 558.

† Laurent, *Du Gage*, Sec. 462.

Baudry-Lacantinerie, *Du Gage*, p. 55.

‡ Troplong, *Nantissement*, Sec. 278.

Laurent, *Du Gage*, Sec. 477.

Aubry et Rau, Vol. 4, p. 705, Sec. 432.

Pont, *Du Nantissement*, Sec. 1132.

Baudry-Lacantinerie, *Du Nantissement*, Secs. 75, 76.

155. Yet, a law writer of no insignificant authority in France, Colmet de Santerre, has upheld the theory that credits or claims may be pledged without delivery of the muniment of title to the pledgee; and, consequently, that even such credits or claims as are not evidenced by title may legally be the subject of the contract of pledge. He bases his opinion substantially upon the fact that the Code Napoleon prescribes the necessity of possession for the validity of the pledge, when that possession is corporeal; that it does not provide for the fictitious possession of an incorporeal right; that the possession of the title is not in reality the possession of the credit or claim; and that the Code did not intend to impose upon the pledge of an incorporeal right more numerous and difficult formalities than for the sale or transfer of such rights.*

This author seems to be isolated in his position on this subject, and the great majority, if not the universality, of French authorities are opposed to this doctrine.

156. Baudry-Lacantinerie combats it victoriously and says that it is in opposition to the traditions of the Roman law and of the old jurisprudence of France, which did not allow of a pledge without dispossession of the debtor. The pledge without such dispossession is in reality a mortgage. This security may have existed in Rome under the name of *pignus oppositum* and been subsequently transformed into a

* Colmet de Santerre, VIII, Sec. 302.

mortgage, by which movable as well as immovable property could be affected. But the pledge properly speaking, the *pignus depositum*, has never taken place without the change of possession from pledgor to pledgee, either in the Roman law or the ancient jurisprudence of France. It would be surprising that the framers of the Code should have admitted this new conception without its being mentioned in their preparatory work. On the contrary, the text of Art. 2076 demands formally the putting in possession of the creditors in all cases, as well when the object of the pledge is a corporeal thing, as provided for in Art. 2074, as when its object is an incorporeal one, such as a credit, as provided for in Art. 2075: The only difference is that the putting of the creditor in possession shall be effected differently for the credits and for the corporeal things. For the credits, it will result, conformably with Arts. 1607 and 1689, from the delivery of the title. Furthermore, this putting in possession is a useful complement of the publicity given by the notification of the pledge to the debtor of the credit. It dispossesses the pledgee and takes away from him the detention of the title, which is the material and external sign of his right to the credit, and thus contributes in a great measure in warning third persons. It results, therefore, from Art. 2075 that credits which are not evidenced by title can not be pledged. It is, indeed, impossible in such cases to put the creditor in possession as the law requires. Third persons could not be informed of the

change which has taken place, and the debtor would not be dispossessed.*

157. The reasoning of Colmet de Santerre, that the pledge of incorporeal things is valid without delivery of the title, because the sale of such things is valid without the transfer of the muniments of title, when there are no muniments of title attached to them, and that the possession of the title is not in reality the possession of the credit or claim ; such reasoning suggests the idea that the pledge of rights, credits or claims, which are not evidenced by title, may perhaps be effected in the form of a sale. We have seen before that, not only in the Common law, but also in the Civil law, according to the majority of the commentators of the Code Napoleon, and the jurisprudence of Louisiana, a pledge is valid if made in the form of a sale, if all the requirements for the contract of pledge are observed—that is, if a written act is passed and possession given to the pledgee, and the transaction is free of fraud.

158. A sale may be made of credits which have no muniments of title, because the delivery and possession to the purchaser are not an essential element of that contract, as they are of that of pledge. But, if the pledge in the form of a sale, in order to be valid as to third persons, must fulfil all the requirements of the contract of pledge, it is clear that the ostensible vendee, in reality the disguised pledgee, must be put in possession of the thing pledged under

* Baudry-Lacantinerie, *Du Gage*. Secs. 74 and 75.

the garb of a sale, and that his possession must be ostensible, notorious and such as to warn third persons. When the thing pledged is a credit without muniment of title, it is evident that the pledge of it in the form of a sale can have no effect as regards third persons. The contract is an innominate one; it is a pignorative transaction, not forbidden by law, binding upon the parties themselves, enforceable accordingly, but giving the creditor no lien, privilege or right of preference.*

159. There can be no question on this point so far as the Civil law is concerned. But what of the Common law? Contracts of security of a pignorative character by transfer of the right, or credit, or claim by the debtor to the creditor are of frequent use in the Common law States. The object of such agreements is to guarantee the payment of an obligation, not to pay and extinguish an obligation. They convey an apparent property, not the ownership itself. They are purely *pignorative* in their nature. The parties call them pledges. The courts have in a number of cases held that they were pledges. Are they so in reality when the rights transferred are not evidenced by any muniment of title and when, consequently, the transferees are not put in ostensible possession, even fictitiously or symbolically, and there are no possible external signs or indications of that possession?

* Baudry-Lacantinerie, Nantissement, p. 62.
Pont, Nantissement, Sec. 1090.
Duranton, Nantissement, Sec. 538.
Ante, Sec. 121.

160. In the Civil law possession is a fact, but it is a fact which is not necessarily rendered manifest or evidenced either by the physical holding or detention of the thing, or constructively in the manner prescribed by law. The mere enjoyment of a right may constitute the possession of it. The Civil Code of Louisiana defines possession in these words: "Possession is the detention *or enjoyment* of a thing, which we hold or exercise by ourselves, or by another who keeps or exercises it in our name."*

The Napoleon Code defines it: "Possession is the detention *or the enjoyment* of a thing or a right which we hold or exercise by ourselves, or by another person who holds it or exercises it in our name."†

161. Thus the legal usufructuary has the possession of his right because he has the enjoyment of it; but that right is not necessarily evidenced by title, and his possession may not be manifested by an external sign.‡

. "Where a credit is concerned the possession does not belong to the person who holds the title, but to the one who possesses the credit—that is, who has the enjoyment of it. It is in this sense that the Court of Cassation says that the possession is not the simple detention of the title, but the enjoyment itself of the thing. Thus the one who receives the interest and

* Civil Code of Louisiana, Art. 3426.

† Code Napoleon, Art. 2228.

Pothier, *De la Possession*, No. 2.

Troplong, *De la Possession*, Secs. 217, 218.

Marcadé, *De la Possession*, p. 57 *et seq.*

‡ Rogron, *Code Civil Expliqué*, Art. 2228.

the dividends of corporate stock has the possession of the stock. *

162. The subject is well explained also by Trop-
long: "Let us see for the delivery of incorporeal
rights. By the Roman law incorporeal rights were
not susceptible of possession. According to Juriscon-
sult Paulus we could only possess corporeal things,
possideri autem possunt que sunt corporalia, and an
incorporeal right escaped possession, *quia nec possi-
deri intelligitur jus incorporale*. However, as those
rights had a real value, the enjoyment or use of them
was called a quasi-possession. In the French law we
do not care for those subtleties, and we think that we
can possess an incorporeal right as well as a thing.
(Art. 2228, Civil Code.) We possess a servitude, a
usufruct, a right of use, and there is a delivery of such
rights when the person for whose benefit they are
transferred has, in point of fact, the enjoyment of
them by the consent of the owner. *Ego puto usum
hujus juris pro traditione possessionis accipiendum
esse*.

"It is the same thing for a credit. The use of the
right which it gives, exercised with the consent of the
owner and of the debtor, is a positive and palpable
delivery." †

These principles of the law of possession are cer-
tainly true in both the Civil and Common law, though
in the former they are consecrated by statute.

* Laurent, Prescription, Vol. 32, Sec. 557.

Dalloz, Prescription, No. 270, 12th March, 1824.

† Trop-Long, De la Vente, Vol. 1, pp. 386, 387.

163. But, when we come to the possession of the pledgee, the Civil law demands more. His possession must be *ostensible*; there must be external signs of it; the dispossession of the pledgeor must be such that third persons dealing with him may be able to see or know that the thing pledged is no longer in his hands or under his control.

In the words of the Court of Cassation: "It is of the essence of the contract of pledge that the delivery of possession to the creditor should be an ostensible fact, of a sufficient notoriety to warn third persons that the debtor is dispossessed of the thing pledged, and that it is no longer part of his unencumbered property."*

And, in the words of the Court of Louisiana: "The possession of the pledgee should be real and effective at all times. It must be apparent and well known."†

164. The reason of this imperative provision of the law is that, if the possession of the pledgee was not rendered ostensible and notorious, third persons could easily be deceived and defrauded by the debtor, inasmuch as the pledge of commercial things, at least, is not registered like the mortgage, in the books of the parish or county, and the public has no other notice of it than by the possession of the pledgee. In the words of Troplong: "But where would we be if the pledge of movable things could be made without delivery? What frauds!

* *Ante*, Sec. 122.

† *Ante*, Sec. 123.

What deceptions ! How third persons would be imposed upon !” * Such being the motive of the law in making the possession of the pledgee an essential condition of the legality of a pledge, and the condition being part of the Common law as well as of the Civil law, it would seem clear that the validity of a pledge in that respect should be tested, under both systems, by the same criterion, to-wit: the publicity or external signs of the pledgee’s possession. In that case, the pledges of credits or claims, or rights, by transfer, as in the form of a sale, when no muniments of title are, or can be, transferred to the pledgee or apparent vendee—such transactions, even if valid and binding upon the parties, should not produce the effects of the contract of pledge and give the creditor a right of priority or preference over third persons, in the Common law any more than in the Civil law.

165. But neither the courts nor the law writers of the Common law seem to acknowledge or recognize the difference between the possession which is sufficient for the validity of a sale and that which is necessary for the validity of a pledge ; and they ignore also, consequently, the distinction between the transfer for the purpose of a pledge of an incorporeal thing, such as a credit, accompanied with the delivery of muniments of title or vouchers, and the transfer and pledge of a credit to which there is no muniment of title or voucher.

* Troplong. Du Gage. Sec. 298.
Ante, Sec. 84.

166. Mr. Schouler says: "That which is incapable of delivery can not, logically speaking, be the subject matter of a pledge; but since money rights, not negotiable, or mere choses in action, may at least be assigned, so that delivery of the muniment or voucher shall answer the purpose of a bailment, this reservation is unimportant in modern practice. The modern Civil law here agrees with us in substance; and to the same purport, apparently, was the Roman law, notwithstanding some equivocal expressions in the Digest." *

The distinguished writer is not *logically speaking*. First, in the Roman law there was no legal possession of incorporeal things, and, therefore, none could be delivered, and, for that reason, such things could not be pledged. In the modern Civil law, the transfer or delivery of possession of incorporeal things is made *by delivery of the vouchers or muniments of title*;† and it is expressly provided that such things may be pledged by such delivery. But there can be no pledge of them when they are not evidenced by title or voucher. Does Mr. Schouler imply, under the maxim *Expressio unius est exclusio alterius*, that the *non-delivery* of the muniment or voucher shall *not answer* the purpose of a bailment?

If so, he is right, and his opinion would agree with that of the Civilians. But a subsequent paragraph

* Schouler, on Bailments, p. 167.
 Troplong, *De la Vente*, Vol. 1, pp. 386, 387.
 Law 3, Digest, *De acq. possess.*

† *Ante*, Sec. 10.

‡ *Ante*, Sec. 8.

shows that he makes no such distinction. Speaking of the pledge of things *in futuro*, he says: "The case of a thing not yet come into being presents some difficulty, for equity has much diluted the strength of the Common law rule in this respect. Granting the rule, it yet appears that the chattel product *in futuro* of that to which one holds a right *in esse*, like the prospective earnings of a voyage, or of some existing contract of service, the year's wool on one's sheep, the milk from one's cow, the severed crops from one's land, a reversionary right as heir, are all decreed assignable interests at this day, and capable of sale; and, if capable of sale, they must be capable of pledge or mortgage."*

167. This is clearly a mistake, and a very serious one. First, things *in futuro* can not be pledged because they can not be delivered.† And, secondly, all that may be sold may be *mortgaged*, because there is no necessity of delivery of possession in mortgage, any more than in sale. But all that may be sold may not be pledged, because the sale may be without delivery and possession, whilst there is no pledge without possession.‡

We find no enlightenment in the words of this writer for the question which occupies us, to-wit: whether there is the same necessity in the Common law as in the Civil law of an ostensible or apparent possession

* Schouler, on Bailments, p. 168.

† *Ante*, Sec. 28.

‡ Jones, on Pledges, Sec. 30.

Laurent, Du Gage, Sec. 472.

Baudry-Lacantinerie, Du Gage, Sec. 88.

in the pledgee to validate the pledge; and hence, whether the transfer of incorporeal things or rights without muniments of title or vouchers is insufficient to constitute a pledge in the Common law as in the Civil law.

168. Neither Judge Story nor Mr. Jones are more explicit on this point, and the latter falls into the same error as Schouler when he says: "An actual delivery of property capable of personal possession is essential. The delivery must be such as would be requisite to transfer the property in the same chattels in case of a sale of them,"* The delivery might be such as to transfer the property in case of a sale, and yet be insufficient to validate a pledge, inasmuch as a sale without delivery at all is legal and a pledge is not.

There again the question is left untouched. Unapparent possession in the vendee is valid. Is it so in the Common law pledgee?

Judge Story's high authority is of no avail either. All that he says on this subject is: "It is of the essence of the contract that there should be an actual delivery of the thing. Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver; and the pledgee acquires no right of property in the thing. What will amount to a delivery of the thing is matter of law. There need not be an actual delivery, manual delivery of the thing. It is sufficient, if there are any of those acts

* Jones, on Pledges, Sec. 23.

or circumstances which, in construction of law, are sufficient to pass the possession of the property. Thus goods at sea may be passed in pledge by a transfer of the muniments of title, as by a transfer of the bill of lading, an assignment, etc. So, goods in a warehouse may be transferred by a symbolical delivery of the key thereof. So, if the pledgee has the thing already in possession, as a deposit, etc., then the very contract transfers to him by operation of law a virtual possession, as a pledge, the moment the contract is completed.”*

There is nothing in those remarks to inform us whether the unapparent possession is sufficient to render a pledge valid; and, hence, whether incorporeal things or rights without muniments of title can be pledged at all under the Common law.

169. Yet it would seem as if in the Common law States the *written transfer* of a right or credit was of itself the delivery of possession to the pledgee, sufficient for the validity of the pledge, even without the muniment of title. In such cases, the possession is not ostensible or notorious, and there is nothing in the transaction by which third persons are put on their guard in their dealing with the debtor and pledgeor. It is clearly against the principles of the law of pledge, and in direct opposition to the rules laid down by the Civilians; but the point does not appear to have impressed the minds of either the courts or the text writers of the Common law.

* Story, on Bailments, Sec. 297.

170. The Court of New York has said: "But it is true that possession must uniformly accompany a pledge. The right of the pledgee can not otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, etc., which can not be manually delivered, was the proper subject of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge."*

171. The Court of California used the same language on this subject. "Incorporeal property being incapable of manual delivery, can not be pledged without a written transfer of the title. Debts, negotiable instruments, stock in incorporated companies, and choses in action generally, are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property.

* *Wilson vs. Little*, 2 N. Y. 446.

The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged." *

172. But in these two cases, in which the pledge was of stocks, there were the muniments of title, the certificates of shares, and the language of the Court was therefore broader than the point there at issue demanded. The question can not be considered by any means as satisfactorily decided. Yet it would seem as if the mere written transfer of a right, without the muniments of title when none exist, would be in the Common law States a sufficient delivery of possession to uphold the contract of pledge.

* Brewster vs. Hartley, 37 Cal. 25.

CHAPTER XII.

173. In the Civil law, the possession of the pledgee being *precarious*, as he does not possess as owner of the thing, but merely as a contractual detainer of another person's property, he never can acquire by occupation, or *usucapio*, through the longest prescription, or statute of limitations, the ownership of the thing pledged. But he has against the pledgeor the correlative right, that his claim is not extinguished by the longest prescription which discharges a debt. because the thing pledged, remaining in the hands of the creditor, is a continuous acknowledgment of the debt by the pledgeor, which stops the course of prescription.

The first of these two principles is enacted in an article of the Civil Code of Louisiana.

The second principle is firmly established by jurisprudence founded upon the Roman law.

The article of the Louisiana Code is in these words :
"The creditor can not acquire the pledge by prescription, whatever may be the time of his possession." *

The Code Napoleon contains no such provision. presumably because the principle is not absolute in France, either as to the *prescriptio acquirendi causa*, in favor of the pledgee, or as to the *prescriptio liberandi causa* in favor of the pledgeor. The French

* Civil Code of Louisiana, Art. 3175.

jurisprudence is meagre on this subject, and the law writers are divided in their exposition of the doctrine. The substance of their discussions amounts to this, that as long as the debt is not paid, whatever may be the length of time that the pledgee has had the pledge in his possession, inasmuch as he possesses *precari-ously* in the name of the pledgeor, he can not acquire the ownership of the thing. The rule is acknowledged by all the French commentators. But, after the debt has been paid, if the pledgeor leaves his property in the hands of the pledgee, the latter then possesses no longer as such, and not even as a depositary, but simply as an ordinary possessor, according to some of the most distinguished writers; and from that moment the *prescriptio acquirendi causa* begins to run in his favor, and the *prescriptio liberandi causa* against the pledgeor, who is creditor of the claim against the pledgee for the restitution of the pledge; and by the prescription of thirty years under the French law, the pledgee acquires the ownership of the thing, and the pledgeor is debarred of the right of demanding the restitution of it. Such is the opinion of Duranton, of Troplong, of Baudry-Lacantinerie, of Laurent, of Aubry et Rau, and of Pont.*

174. The two prescriptions, *acquirendi causa* and *liberandi causa*, are blended in one article of the Code

* Duranton, Droit Civil, Nantissement, Vol. 18, Secs. 551, 552, 553.
Troplong, Nantissement, Secs. 476, 477.
Baudry-Lacantinerie, Nantissement, Secs. 93, 142.
Laurent, Nantissement, Secs. 417 and 525.
Aubry et Rau, Vol. 4, p. 714, Sec. 435.
Pont, Connaissance, Sec. 1166.

Napoleon, for the prescription of thirty years, or rather, the Code Napoleon contains no provision for the prescription *acquirendi causa* of thirty years directly as it does for the prescription of ten years, but obtains the same object indirectly by providing that all *real actions*—that is, actions to claim property, movable or immovable, are prescribed by thirty years. The possessor of thirty years, therefore, acquires the ownership of property by *usucapio*, inasmuch as all actions to impugn his rights of possession and occupancy are barred.

The article of the Napoleon Code is in these words : “All actions, *as well the real ones as the personal ones*, are prescribed by thirty years, and the party who pleads that prescription is not obliged to show any title, nor can the exception of bad faith be opposed to him.” *

175. The Code of Louisiana, on the contrary, provides specifically for the acquisition of property by the *prescriptio acquirendi causa*. It enacts that : “The ownership of immovables is prescribed for by thirty years, without need of title or possession in good faith.” And, also : “When the possessor of any movable whatever has possessed it for ten years without interruption, he shall acquire the ownership of it, without being obliged to produce a title, or to prove that he did not act in bad faith.” †

176. But a very serious and interesting question

* Code Napoleon, Art. 2262.

† Civil Code of Louisiana, Arts. 3499 and 3509.

on this subject has occupied the commentators of the Napoleon Code and divided them. The action of the pledgeor against the pledgee for the *restitution* of the thing pledged being prescribed by thirty years from the time that the debt was paid, and, as in consequence thereof the pledgee was no longer in precarious possession as such, can the pledgeor still claim his property from the former pledgee if it is still in his hands, by virtue of the action of *revendication*, which is not prescriptible by any length of time, because it is brought against a precarious possessor who can not plead any prescription at all?

177. Pont is of the opinion that this last resource is still available to the pledgeor. He says: "But there remains yet to the debtor the action in revendication as long as the pledge is still in the hands of the creditor, if, notwithstanding the payment of the debt, he has not ceased to possess the thing; and as to that action, it is imprescriptible on account of the character of the possession." *

178. Baudry-Lacantinerie, after considering both sides of the question, says that he inclines toward the theory which allows the revendication of the pledgeor. †

179. Duranton ignores the doctrine of the change in the character of the pledgee's possession by the fact of payment of the debt, and therefore considering

* Pont, *Nantissement*, Sec. 1166.

† Baudry-Lacantinerie, *Nantissement*, Sec. 93.

the possession as still precarious, recognizes the right of the pledgeor to the action in revendication. *

180. Laurent is strongly opposed to the right of revendication, which, he says, does not exist in the premises, as the possession of the pledgee is no longer precarious after payment of the debt, and he can, therefore, plead the prescription of thirty years.†

181. The importance of the question is less of a practical than doctrinal nature, for the case would rarely present itself in France, no debtor being likely to leave his property in the hands of his creditor during thirty years after paying the debt for which the pledge was given.

182. Could the same question be raised in Louisiana, where the law provides that the *creditor* can not acquire the *pledge* by prescription, whatever may be the time of his possession? After the pledgee is paid, he is no longer a *creditor*; and the thing left in his hands by the debtor is no longer a *pledge*. It would seem that the reasoning of the French commentators would be equally applicable to the law of Louisiana. The point does not appear to have presented itself in that State; but such a case is more likely to arise there, as the prescription for the ownership of movables is only of ten years.

183. As long as the pledge remains in the hands of the creditor, the debt which he secures can not be extinguished by prescription, because the pledge, in

* Duranton, Nantissement, Sec. 552.

† Laurent, Nantissement, Sec. 525.

that case, is an acknowledgment of the existence of the debt, which produces a continuous interruption of the course of prescription. The acknowledgment of the debt by the debtor is one of the modes by which prescription is interrupted. By leaving the thing pledged in the possession of the creditor, the pledgee is presumed not to have been able to withdraw it for want of payment, and he, therefore, tacitly acknowledges that the debt is unpaid and is still due. This principle was part of the Roman law, and is now part of the modern Civil law. With one exception, that of Colmet de Santerre, all the French commentators agree upon the subject. And, in the jurisprudence of the State of Louisiana, the rule has become axiomatic. In a recent case, the Court of that State said: "The proposition advanced by plaintiff, that prescription does not run during the existence of the pledge, is indeed too firmly established to be attacked."*.

Mr. Pont says, in that respect: "The debtor who leaves the thing pledged in the hands of the creditor acknowledges by that fact, and in a continuous manner, both his obligation and the right of the creditor."†

* *Conger vs. New Orleans*, 32 La. An. 1253.

Wilson vs. Bannen, 1 Rob. (La.) 556.

Citizens Bank vs. Knapp, 22 La. An. 107.

Blanc vs. Hertzog, 23 La. An. 190.

† Pont, *Nantissement*, Sec. 1167.

Troplong, *Nantissement*, Sec. 474.

Duranton, *Nantissement*, Sec. 553.

Aubry et Rau, Vol. 3, p. 520.

Baudry-Lacantinerie, *Nantissement*, Sec. 102.

Marcadé, *Prescription*, p. 146.

Codex, Lex 7, Sec. 5. *De Prescript.*

Colmet de Santerre, VIII, Sec. 312.

CHAPTER XIII.

184. The Common law differs altogether in the matter of prescription, or the statute of limitations, as applicable to the contract of pledge, from the Civil law. Under the rules of the Common law there is no limitation to the right of the pledgeor to demand and recover the thing pledged on payment of the debt; in other words, the right to redeem the pledge is never barred by any lapse of time; or, in other words again, there is no prescription *acquirendi causa* in favor of the pledgee. The special property remains in him as long as he detains the pledge, but the absolute property, or ownership, never passes to him without foreclosure or transfer and by the mere effect of time, even when the term of payment was stipulated in the contract. Such is Judge Story's statement of the principle of the Common law on this subject. But after saying that "prescription, or the statute of limitations, does not run against it" (the pledgeor's right to redeem), he adds: "However, after a long lapse of time, if no claim for a redemption is made, the right will be deemed to be extinguished; and the property will be held to belong absolutely to the pawnee. Under such circumstances a Court of Equity will decline to entertain any suit for the purpose of a redemption."*

* Story, on Bailments. Sec. 346.

185. The more modern jurisprudence of the Common law does not seem to have made much progress in that direction, and the later writers do not throw more light on the subject. Mr. Jones repeats, in substance, the rather indefinite doctrine of Judge Story, that after a *long lapse of time* without any claim on the part of the pledgeor to redeem, his right *might be deemed* to be extinguished and the title absolute in the pledgee.*

And Mr. Schouler tells us that, strictly speaking, the statute of limitations does not run against a pledge; but inasmuch as it runs against a pledgee's enforcement of the secured debt or engagement, so will equity decline to entertain the pledgeor's bill for redemption, if he or his representatives bring it *unreasonably late*; for the property will then be conclusively presumed to have vested in the pledgee.†

186. What measure or standard of measure has the Court of Equity to fix the lapse of time which will bar the pledgeor in the absence of legislative limitations? Will not the decision be an arbitrary one, depending upon the peculiar idiosyncrasy of the chancellor, however disposed he may be to do justice in the premises?

Well has Mr. Schouler remarked in closing the chapter of his Book on Pledge: "This whole doctrine of pledge is one which has unevenly developed at the Common law; and our rules are frequently derived

* Jones, on Pledges, Sec. 581.

† Schouler, on Bailments, p. 225.

from the Roman law of pledge, which, however, in many points differs from our own ; or else we borrow from the analogies of the chattel mortgage." *

It is worthy of note in connection with this remark of Mr. Schouler, that Judge Story, in his treatise on Pledge, cites oftener in support of his views Pothier and Domat, the great Civilians, than the Common law authorities.

187. The Common law differs also completely from the Civil law on the question of the extinguishment by prescription, or the statute of limitations, of the debt secured by the pledge, whilst the thing pledged remains in the hands of the pledgee. What is the rule at Common law in this respect would be a legal anomaly in the Civil law, first, as to the pledge remaining in existence after the debt is barred by the limitation, and, secondly, as to the debt running out of existence, also by limitation, whilst the pledge is alive in the hands of the pledgee.

188. The fundamental principle of the law of contracts in the Civil law, and particularly of the pledge, mortgage and suretyship, is that these three contracts being merely accessory to a principal contract, cease to exist when the latter ceases to exist. They are intended to secure the payment of an obligation ; when that obligation goes out of existence by payment or for any other reason, the accessory contract necessarily goes out of existence also ; it dies with the cause for which it was created ; it has no longer any office

* Schouler, on Bailments, p. 233.

to fulfil and therefore no reason to be. The principle is derived from the Roman law, *Cum causa principalis non consistet, ne eaquidemque sequuntur locum habent*.*

At Common law the debt may be barred by the statute of limitations, but the pledge remains alive in the hands of the creditor and his lien upon it survives the personal obligation of the debtor. In the words of the Court of Massachusetts: "The pledgeor might avail himself of the statute of limitations as a defence to a suit upon the note. But the statute affects merely the remedy on the note, and does not, on the one hand, defeat the lien of the pledge upon the property pledged, nor, on the other, enlarge that lien to an absolute title to the property."†

In that case it was contended by the pledgeor that the note representing the debt secured, being outlawed by the statute of limitations, the pledgee, who had received after the note was barred the amount of the bonds pledged, should account for them in full. The Court held on the contrary that the pledge still subsisting, according to the principle stated above, after the right to sue on the debt was barred, the

* Pothier, Des Obligations. Sec. 367.
Civil Code of Louisiana, Arts. 3137, 3138.
Code Napoleon, Art. 2012.

† Hancock vs. Franklin Insurance Company, 114 Mass. 156.
Shaw vs. Silloway, 145 Mass. 503.
Lewis vs. Hawkins, 23 Wall. 119.
Hardin vs. Boyd, 118 U. S. 756.
Joy vs. Adams, 26 Me. 330.
Belknap vs. Gleason, 11 Conn. 160.
Coldeleugh vs. Johnson, 34 Ark. 312.
Hulbert vs. Clark *et al.*, 128 N. Y. 295.

pledgee could set off the amount due him and was only compelled to return the surplus to the pledgeor.

190. Mr. Jones adopts the doctrine declared by the Court of Massachusetts, and repeats after it, that the statute affects merely the personal remedy against the pledgeor, and does not either defeat the pledge and the lien it creates, or enlarge that lien to an absolute title to the property.

And the same writer continues the statement of the rule, and says that, on the other hand, a debtor can not by reason of his debt becoming barred by the statute recover back the security pledged; that nothing short of payment or tender of the debt will discharge the lien and entitle the debtor to its return; and that the statute of limitations does not extinguish the debt, but only the remedy to enforce it.*

191. Judge Story seeks his way, on this subject, by meandering between the Common and the Civil law, showing his ordinary partiality to the latter. He treats the question hypothetically and says:

“If the right to the debt is barred by prescription, it is said in the Civil law, that the right to the pledge is gone also. This would be true in the Common law also, when from the length of time there arises a prescription of the payment of the debt. But, if there is merely a positive bar by the statute of limitations

* Jones, on Pledges, Sec. 581 and 582.

Lawson, on Bailments, Sec. 70, No. 5.

Am. and Eng. Ency. of Law, *Verbo* Pledge, p. 734.

Jones, on Mortgages, Sec. 1204 *et seq.*

Edwards, on Bailments, Secs. 249 and 323.

Chitty, on Contracts, 4th Am. Edition, p. 427.

Parsons, on Contracts, 6th Edition, p. 108.

against a personal action for the debt, it may deserve consideration, how far this will oust the party of his right to retain the pledge toward satisfaction of the debt: for the possession of the pledge may be the very reason why the pledgee has omitted to bring a personal suit for the debt within the prescribed time. The pledger is not ordinarily barred of his right to redeem the pledge, so long as the pledgee may be presumed to hold it as a pledge. And the continued possession of the pledgee, under such circumstances, affords proof of the non-extinguishment of the debt, although the statute of limitations may present a bar to a mere personal action. On the other hand, if a very long period has elapsed, and the pledge has continued in the possession of the pledgee, it affords a presumption of an abandonment of it by the pledger, and if any presumption of an extinguishment arises in such a case, it is an extinguishment by receiving the pledge in satisfaction. If, then, the statute of limitations has run against the debt, as a personal claim, and the pledger seeks to recover back the pledge, why may not the pledgee avail himself of the protection of the same statute to bar such suit? And if the pledger insists that it is still a pledge, why may not the other party avail himself of all the fair presumptions arising in the case, that the debt has not been in fact paid, or that the pledge has been deemed a satisfaction of it? Some of the adjudged cases seem silently to admit the existence of a right in the pledgee over the pledge notwithstanding the lapse of a period exceeding that of the statute

of limitations for personal recoveries. This however must be considered, in the absence of direct authority, as a point merely propounded for further consideration. But if the pledger admits the existence of a debt, and brings a bill to redeem, he can do so only upon payment of the debt, although the statute of limitations might otherwise be pleaded as a bar to it.”*

192. The doubt thus expressed by Judge Story as to the continued existence of the pledge when the personal right of action on the debt is barred by the statute of limitations, has been solved by the subsequent adjudications, as we have seen.

193. However different the Civil and the Common law are on this point, they each have their logic and their *rationale*, and the difference comes from the difference in their law of prescription, or limitation. The Civil law prescription *liberandi causa* is based upon the presumption of *payment*. The presumption is *juris et de jure*. It is not rebuttable by proof to the contrary. The law presuming payment extinguishes the debt itself. It does not merely destroy the right of suing upon it. There being no principal obligation left, when the debt is prescribed, clearly the pledge, the only purpose of which was to secure the obligation, can not outlive it and must go with it. †

* Story, on Bailments, Sec. 362.

† Domat, 2 Vol., Des Prescriptions, p. 208.

Pothier, Des Obligations, 2 Vol., pp. 149, 156.

Marcadé, Prescription, p. 178.

Troplong, Prescription, 2 Vol., pp. 337 *et seq.*

Laurent, Prescription, Sec. 372.

Code Napoleon, Art. 2262.

Civil Code of Louisiana, Arts. 3528, 3530.

Brown vs. Insurance Co., 3 La. An. 183.

The statute of limitations, on the contrary, only takes away from the creditor the right and the power to sue his debtor for payment of the debt. The debtor is personally put beyond the reach of his creditor so far as suit and judgment against him are concerned. But the obligation itself is not extinguished, because the statute is not based upon a presumption of payment, and does not discharge the debt. Both the Civil law and the Common law statutes are statutes of repose in this, that they are intended to quiet persons and settle titles; but their reasons are not the same and their effects are not the same. The Civil law remedy goes much farther than that of the Common law.

194. As to the principle of the law of contract, that the accessory falls with the principal, and that the pledge, mortgage or suretyship falls with the principal obligation which it secures, there can be no difference between the two great systems of law, because both are founded upon the same rules of reason. It is clear, therefore, that, at Common law as well as in the Civil law, when the debt secured is absolutely extinguished, either by payment or otherwise, the pledge itself is extinguished, and the pledgee is bound to return the thing pledged. On this point, Judge Story is positive. "So, whatever by operation of law extinguishes the debt, extinguishes the right to the pledge. Therefore, if in a suit for the debt the pledger has a judgment in his favor, which bars any future recovery of the debt, that extinguishes the right to the pledge."*

* Story, on Bailments, Sec. 361.
Schouler, on Bailments, p. 233.
Edwards, on Bailments, Sec. 309.

195. We must now consider the further difference between the Civil and Common law as to the legal consequence of the thing pledged remaining in the hands of the pledgee after the debt secured has matured and been unpaid, and the effect of this fact on the prescription of the obligation. We have already seen before, that in the Civil law the presence of the pledge in the hands of the pledgee is an acknowledgment by the pledgor that the debt is not paid, sufficient to produce a continuous interruption of the prescription.*

196. It is not so at Common law. There, the continued possession of the pledgee does not interrupt or go counter to the bar of the statute of limitations. The reason of this is that, in order to take the case out of the statute, there must be a new promise on the part of the debtor to pay the old debt, or at all events an acknowledgment which is equivalent and amounts to a new promise. And such acknowledgment or new promise must be in writing and must be expressed and positively declaratory of the intention of the debtor to pay the debt. Such was the law of England under the statute 9 George IV, C. 14; and a similar requirement is made in most of the States of the Union.†

It is evident that these conditions necessary to remove the bar of the statute of limitations do not exist by the mere possession of the pledgee after the maturity of the debt.‡

* *Ante*, Sec. 183.

† Parsons, on Contracts, Vol. 3, 6th edit., p. 73.

Chitty, on Contracts, 4th Am. edit., p. 639.

‡ Edwards, on Bailments, Sec. 323.

197. By the Civil law, the bar being based on the presumption of payment, any acknowledgment, express or tacit, from the debtor that the debt is not paid is sufficient to interrupt the course of prescription. The acknowledgment may not be accompanied by a promise or even an intention to pay the debt.

198. By the Common law the bar being entirely a statute of repose, intended to relieve the debtor whether the debt is paid or not, and, therefore, not based upon the presumption of payment, the acknowledgment of the existence of the debt, whether express or tacit, unless it contains the intention to pay, produces no effect against the course of the statute.

CHAPTER XIV.

RIGHTS AND OBLIGATIONS OF THE PLEDGEE.

199. The contract of pledge is an accessory one, as it only takes place to secure a principal obligation; but it is at the same time what the Civilians call a *unilateral* contract; that is, a contract in which one party alone binds himself to the performance of the obligation. In the contract of pledge, it is the pledgee who binds himself; the pledgor does not. The latter is already bound to the payment of his debt; but he does not bind himself any more or further in securing it by the pledge; he only binds his property, the thing pledged; he incurs no additional personal obligation. It is the pledgee who binds himself to return the pledge on payment of his claim, and, in the meantime, to take proper care of it. Such is the opinion of Laurent.*

But Pothier, Troplong, Baudry-Lacantinerie, and generally the other French law writers, do not agree with Laurent on this point, and think that the contract of pledge is an imperfect synallagmatic contract, because the pledgor is also interested in it to the extent of obtaining credit, and is bound by the obligation of refunding to the pledgee the necessary expenses for the preservation of the thing pledged, like the de-

* Laurent. Nantissement, Sec. 437.

positor in the contract of deposit.* The question is, at all events, purely doctrinal and of no practical importance.

200. The pledgee has, therefore, duties and obligations as well as rights in the contract of pledge. Let us see what those rights and those obligations are.

The object of the pledge is to secure the creditor and to give him a right of priority and preference over the other creditors of the pledgeor in the proceeds of the thing pledged. This privilege or preference is therefore the first right of the pledgee. But he has it against those other creditors only if he has possession of the pledge, and under the rule of the Civil law, when a written act of pledge is necessary, only if such act has been passed and recorded. This lien, called *privilege* by the Civilians, is a real right, which does not result from the nature of the debt, as privileges generally do, but arises from the contract of pledge itself and the fact of delivery and possession combined. Moreover, it is not, as in the Common law mortgage, a right of property in the thing pledged, but only a right of preference in its proceeds.

Between the pledgee and the other creditors, possession, and the written act in the Civil law countries except in commercial pledges, are indispensable to create the lien or privilege; but not so between the pledgee and pledgeor. As to them the mere

* Pothier, Nantissement, Secs. 14, 15.
Troplong, Nantissement, Secs. 31, 32.
Baudry-Lacantinerie, Nantissement, Sec. 7.
Pont, Nantissement, Sec. 1067.

agreement makes a valid pledge if accompanied by delivery. If the pledgee has been put in possession, he may retain it until he is paid; if he has not been put in possession, he has an action to compel the debtor to comply with the terms of the agreement and to deliver the pledge. But this has been considered and declared to be a promise of pledge, but not a pledge. The promise is enforceable by law, either by specific performance, or by a claim for damages; but the creditor has no lien or right of preference in the meantime on the thing which formed the subject of the promise of pledge.

The constitutive elements of the contract of pledge being the same in the Civil and in the Common law, the two systems are in harmony upon this point.*

201. Yet, the promise to affect some specific property to the payment of a specific debt may give to the creditor a right to an equitable lien under the rules of the Common law. Such equitable lien is unknown to the Civil law. This will be the subject of a subsequent chapter.

202. *The thing pledged being put in the possession of the pledgee, is in his hands in the nature of a deposit.* He must take care of it and preserve it as a depositary must do of the thing deposited. Has he the right to make use of it? Here the Civil law and

* Troplong, Nantissement, Secs. 2, 237.

Jones, on Pledges, Secs. 27, 28, 29.

Succession of D'Meza, 26 La. An. 35.

Baudry-Lacantinerie, Nantissement, Sec. 7.

Pothier, Nantissement, Sec. 9.

Am. and Eng. Encyc. of Law, Pledge, p. 596. Notes.

the Common law disagree. On principle, and under the unanimous authority of the Civilians, we should say that the pledgee has no more right to use the pledge than the depositary has the right to make use of the thing deposited.

203. The French Code provides that: "Until the expropriation of the debtor, if it take place, he remains the owner of the thing pledged, which is in the hands of the creditor only a deposit securing the privilege of the latter."^{*}

The Code of Louisiana contains the same provision and in the same words.[†]

Laurent, on this point, remarks very conclusively: "If the law says that the pledgee only has the thing on deposit, it is to show that he can not make use of it though it is in his possession. In this respect, the right of the pledgee differs from the other real rights which are accompanied by possession: usufruct, servitude (easements), emphyteusis, superficies, give a right in the thing which implies the faculty to use and enjoy it. If it is otherwise with the pledgee, it is because his possession has only one object, and that is to guarantee the payment of his debt."[‡]

204. Troplong says on this subject, commenting upon the same article of the Code Napoleon, which assimilates the pledgee to a depositary as to the possession of the thing: "If he (the pledgee) possess the thing, it is only for a restricted and limited purpose,

^{*} Code Napoleon, Art. 2079.

[†] Civil Code of Louisiana, Art. 3166.

[‡] Laurent, *Nantissement*, Sec. 493.

F. Herman, *Code Civil*, Art. 2079. No. 5.

and that is only to secure his right of preference. His possession is precarious ; it only gives him the right to keep, retain and preserve the thing. It follows hence that he can not make use of it.” And he cites the Institutes of Justinian : *Si creditor pignore utatur, furtum committit*.*

But Troplong is very positive also that the pledgee may subpledge to his own creditor *for commercial purposes and in commercial transactions*, as we will see later on.

205. It is evident that if the object of the law in placing the pledgee in possession of the pledge is only to secure his lien and to protect third persons against deception and fraud, he has no right to use the thing for his own pleasure or benefit without the consent of the pledgor. Such use is undoubtedly an abuse of his right of possession. It is violative of the spirit and nature of his contract. It is a breach of trust in reality. Any other doctrine on this point is a departure from the true principles of the law of pledge. In reality, if the pledgee makes use of the thing pledged for his own advantage he is combining the effects of the contract of pledge and those of the contract of loan, and for this there is no warrant of law whatever.

206. Baudry-Lacantinerie is equally of opinion that the law, in placing the pledge in the hands of the debtor, has had in view, it is true, to secure his right of priority and preference ; but that it is the only advantage that he is entitled to, and that, in reality, the law

* Troplong, Nantissement, Secs. 420. 421.

has intended in dispossessing the pledgeor rather to protect third persons than to favor the pledgee, and he adds: "From the principle enacted in Art. 2079, as we have shown it, it results that the pledgee can neither make use of the thing pledged, nor have the enjoyment of it, nor receive any profit from it, without the consent express or tacit of the pledgeor. *

The same views on this point are entertained by all the commentators of the French Code and expounders of the Roman law, its source and origin. †

This principle prevails also generally in the countries of continental Europe, which derived it from the Roman law. ‡

207. The principle that the pledgee has no right to use the pledge for his own purposes is so well established in the modern Civil law that in the pledge of negotiable paper, such as bonds payable to bearer, he is bound to return to the pledgeor, on payment of the debt, the identical bonds pledged, and can not, unless by agreement, substitute to them other bonds of same quality, value and kind. And, if it is agreed between pledgeor and pledgee that the latter shall have such right, the Civilians consider the convention perfectly valid, but that it is no longer a pledge, inasmuch as, in the nature of this contract, the identical thing pledged must be returned if the pledge is redeemed. Yet it seems customary, in commercial or financial

* Baudry-Lacantinerie, Nantissement, Sec. 96.

† Duranton, Nantissement, Sec. 543.

Pont, Nantissement, Sec. 1165.

Pothier, Nantissement, p. 250.

‡ De St. Joseph, Concordance Des Codes Civils, p. 109.

dealings, for bankers who take on pledge such negotiable paper, to consider themselves the owners thereof, in this sense, that they have the right to dispose of them and owe the pledgees only paper or bonds of the same kind in return.*

208. Such contention is well founded even in countries of the Civil law, if it is shown that the custom of the locality is so well established that the pledgeor is presumed to have acted under it, and thereby agreed to it. A memorable instance of this contention arose in France in the case of the banker *Mirès*. The corporation of which he was the managing director loaned money on the pledge of stock. He sold the stock at a time when it had arisen in the market and accounted to the pledgees for the proceeds, pretending that it had been sold when depreciated. He was prosecuted for breach of trust and larceny, and was sued also in a civil action for damages. His defence was mainly that, by the terms of the pledge, as tacitly understood between the parties, he was only bound to return to the pledgeor stock of the same kind, value and quantity, which he was willing to do. He supported his defence by the fact that the receipt given to the pledgeor for the stock only designated and described the stock as such, but did not give the numbers of the shares, or identify them individually in any manner. He contended further that he acted, in selling the stock, under a well-established custom of bankers in similar circumstances. The Courts held that the

* *Laurent, Du Gage, Sec. 494.*

pledgeors could not be bound by a custom of which they had no knowledge; and that, even if the custom did exist, as claimed by Mirès, it would be no warrant or defence for committing a fraud. The Criminal Court of the first instance convicted him. He appealed to the higher court, which confirmed the judgment. On a further appeal to the Court of Cassation the judgment was reversed for want of form, and the case remanded to the Court of the first appeal. The original judgment of conviction was then reversed. The Minister of Justice, considering the matter as of the greatest public order and interest, ordered that the case be carried to the Court of Cassation. There the guilt of Mirès was finally decreed, and he was sentenced to five years' imprisonment. That judgment was the highest consecration of the principle of the modern Civil law that the pledgee has no right to make use of the pledge without the consent of the pledgeor.*

209. There are exceptions to this rule, and there are certain cases in which the use of the thing pledged is legitimate and implied in the contract, such as in the pledge of working cattle, but in such cases the pledgee must account for the use or services of the cattle and credit the pledgeor with the same. The like rule applied to the pledge of slaves in the Roman law.†

The pledge of a horse authorizes, nay, compels the

* Laurent, *Du Gage*, Sec. 494.

Journal du Palais, 1862, p. 785.

† Troplong, *Nantissement*, Sec. 420 *et seq.*

pledgee to use him for the purpose of exercise, without which he would suffer and possibly die. This rule is the same in the Civil and the Common law.*

210. There is also an exception to the principle that the pledgee can not make use of the thing pledged, when that thing is a claim or chose in action bearing interest, or stock on which dividends are declared. The pledgee is entitled to the interest or dividends, but he should also in such cases credit the pledgeor with the amounts thus received by him. This rule is also common to the Civil and Common law.†

211. The Code of Louisiana provides for the right of the pledgee to receive the fruits of the pledge, but he must account for them or deduct them from his claims. "The fruits of the pledge are deemed to make part of it, and therefore they remain, like the pledge, in the hands of the creditor; but he can not appropriate them to his own use. He is bound, on the contrary, to give an account of them to the debtor, or to deduct them from what may be due to him."‡

This is not properly expressed, for the pledgee does appropriate the fruits to his own use when he deducts them from what is due him.

The next article provides for that. "If it is a credit which has been given in pledge, and if this credit

* Story, on Bailments, Sec. 89.

Jones, on Pledges, Secs. 81, 82.

† Laurent, Droit Civil, Vol. 28, Sec. 499.

Pothier, Nantissement, Sec. 24.

Merlin, Rep., *verbo* Gage.

Am. and Eng. Ency. of Law, Vol. 18, p. 703.

Jones, on Pledges, Sec. 398.

‡ Civil Code of Louisiana, Art. 3168.

brings interest, the creditor shall deduct this interest from those which may be due him; but if the debt, for the security of which the claim has been given, brings no interest itself, the deduction shall be made on the principal of the debt." *

This article is taken from the Napoleon Code.† The previous one is not; but the principle exists in the French law and is derived also from the Roman law.‡ It is evident that the fruits of the thing pledged can not belong to the pledgee, if they are natural fruits, for the reason that the thing is put in his hands only to secure his debt and not to benefit him in any other way. If the fruits are the interest of a debt or the dividends of corporate stock, or money produced in some manner, then the pledgee receives the interest, dividends or money, by virtue of the pledge, but on account and in deduction of his claim against the pledgor. §

212. As to the capital of a claim pledged, under the rule of the Civil law, the pledgee has no right to receive it from the debtor of the claim. And it seems doubtful whether a clause in the act of pledge stipulating such a right in favor of the pledgee would be valid, because it would enable him to appropriate the thing pledged to himself, which the law forbids.¶ Yet, some of the commentators of the French Code express the opinion that, with the consent of the

* Civil Code of Louisiana, Art. 3169.

† Code Napoleon, Art. 3169.

‡ Pothier, Nantissement, Sec. 23.

§ Baudry-Lacantinerie, Nantissement, Sec. 96.

Laurent, Nantissement, p. 494.

pledgeor the pledgee may receive payment of the claims pledged directly from the debtor of the claim.* But, in France, under the provisions of its Code of Commerce, the pledgee of a commercial pledge has the right to collect and recover the claims or securities pledged to him. †

213. The Common law and the jurisprudence of Louisiana are in accord in this and differ from this rule of the Civil law, and have established the principle, that the pledgee of a chose in action can bring suit on the same in his own name, and recover and receive the amount in payment of his debt, being bound, of course, to return the surplus, if any, to his pledgeor.‡

Indeed the law of Louisiana specially provides that if the credit which has been given in pledge becomes due before it is redeemed by the person pawning it, the creditor, by virtue of the transfer which has been made to him, shall be justified in receiving the amount and in taking measures to recover it. When the amount is received he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge. “If the credit which has

* Baudry-Lacantinerie, *Nantissement*, Sec. 98.

Duranton, *Nantissement*, Sec. 538.

Pont, *Nantissement*, Sec. 1180.

† Baudry-Lacantinerie, *Nantissement*, Sec. 155.

Code de Commerce, Art. 91.

‡ Succession of Dolhonde, 21 La. An. 5.

Ducasse vs. McKenna, 28 La. An. 419.

Chaffe & Sons vs. DuBose, 36 La. 257.

Story, *Bailments*, Sec. 321.

been given in pledge becomes due before it is redeemed by the person pawning it, the creditor, by virtue of the transfer which has been made to him, shall be justified in receiving the amount, and in taking measures to recover it. When received, he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge.”*

214. But we must make a distinction in the Civil law between the general use of the pledge and that particular use of it which consists in subpledging or repledging it by the pledgee. And we must also distinguish between the act of the pledgee subpledging or repledging the thing and the act by which he transfers his claims and rights as pledgee to a third person. As to the right to subpledge or repledge, there seems to be a diversity of opinion among the Civilians, and some writers express the opinion that the pledgee has such right. And as to his right to transfer his claim against the pledgeor together with the pledge attached to it, the Civilians are generally of the opinion that it may be done without violating the contract of pledge. But these points will form the subject of the following chapter.

* Civil Code of Louisiana, Art. 3170.

CHAPTER XV.

SUBPLEDGE OR REPLEDGE BY PLEDGEE.

215. Has the pledgee the right to subpledge or repledge to secure his own obligation, the thing pledged to him by his debtor? From the principle of the Civil law that he has no right to use the pledge, it follows that he has no right to pledge his pledge, or make a subpledge of it, because that is clearly making use of the thing pledged. It is what Laurent affirms. “From the principle that the pledgee has the thing pledged only on deposit, it follows that he can not subpledge it.”*

Baudry-Lacantinerie says the same thing. “From the principle that the pledgee is not the owner of the thing pledged, it results that he can not subpledge it.”†

216. Pont, on the contrary, remarks: “But the pledgee is not forbidden, as we have explained it, to subpledge the thing.”‡ But when we come to the explanation he alludes to, we find that he does not show that the pledgee is *not forbidden* to subpledge. He simply explains that, if the subpledgee is in good faith and in ignorance of the fact that the pledgee is not the owner of the thing, but simply the pledgee of it,

* Laurent, Nantissement, Sec. 496.

† Baudry-Lacantinerie, Nantissement, Sec. 95.

See Pothier, Nantissement, Sec. 27.

‡ Pont, Nantissement, Sec. 1165, p. 649.

such subpledgee is protected by the rule of the French law that the possessor of movable property is presumed to be the owner and can convey the title to a *bona fide* purchaser or pledgee. Pont says further that the subpledgeor in that case would be estopped from denying that the thing is his property, after holding out to the subpledgee that it was.

217. Troplong occupies the same position on this question, not pretending that the pledgee, as a matter of right, is permitted to subpledge, but that the subpledgee, if in good faith and in ignorance of the real title of the subpledgeor, will be protected and the subpledge maintained by virtue of the same rule of the French law, that for movable property possession is equivalent to title. Troplong, also like Pont, after saying that the pledgee can not sell or abuse the pledge, asserts that "he may, however, pledge it." His reasoning, like that of Pont, shows rather that the pledgee *has no right* to subpledge, but that he *can* do it, as a matter of fact.*

When he comes to the illustration of the rule in commercial affairs, Troplong is very positive about the faculty of the pledgee to subpledge. We will give his own words:

"Sometimes the pledgee, consignee of the merchandise, subconsigns it in consideration of advances made to him. For instance, a commission merchant who has no money to make the advances which his correspondent demands of him on the goods which he

* Troplong. Nantissement, Secs. 82, 83, 422, 423.

ships to him, borrows from a third person the funds which he needs. Can he assign to the latter his privilege by putting the bill of lading in his hands? Has the assignee a privilege on the goods thus subconsigned to him? The affirmative seems to me undeniable, as well as to Delamare and Lepoitevin; and if reference is made to the decision of the Court of Cassation of 23d April, 1816, which I have cited above, it will be seen that this mode of action is customary in commerce.

“It extends credit; it facilitates negotiations; it puts in motion capital and the shipping of merchandise.”*

It is difficult to reconcile these views with the opinion of Laurent and that of Baudry-Lacantinerie, quoted above.

218. Judge Story thinks that the Civil law gives the right to the pledgee to subpledge and to transfer the pledge. But we must bear in mind that when he speaks of the Civil law he means the Roman law. Of the modern Civil law as enacted in the Code Napoleon, he does not seem to be well informed. His frequent confusion of the Civil law of modern times with the institutions of the old Roman law is apt to lead his readers into error. In the instance of the right of the pledgee to subpledge and transfer the pledge, he cites Domat and the Codex. But Domat was imbued with the Roman law and preceded the Napoleon Code and its great commentators by nearly two

* Troplong, Nantissement, Sec. 251.

centuries. The Roman law did allow the pledgee to subpledge to his own creditor. But we must note the distinction which it made between the subpledge and the use of the pledge by the pledgee. The latter, as we have seen, was prohibited.* Troplong professes the same doctrine, as he contends that the pledgee may subpledge, but can not use the pledge.†

219. We will see that the reasoning of the Common law writer leads to the same conclusion, and the pledgee *may* subpledge though he has not the *right* to do so. The sum total of it is, that the common assent, based upon the wants of the commercial world, is stronger than an abstract principle of law; and that a few civilians and most, if not all, the jurisconsults of the Common law countries, have departed from the true nature of the contract of pledge and admitted, if not consecrated, the popular rule of the subpledge by the pledgee.

220. If in certain commercial or financial transactions, it is established by usage or custom that a bank or other moneyed institution has the right to subpledge the collateral securities in its hands, it is because the pledgeor knows, or is presumed to know such custom, acts under the established rule and, therefore, tacitly consents that his pledgee should make such use of the pledge, and subpledge it, or transfer his pledge, at his own risk and peril. But, as this is only done

* Troplong, *Nantissement*, Sec. 82.
Digest, Lex 1. C., *Si pignus pignori*.
Ante, Secs. 204.
† Ante, Sec. 216.

by the implied consent of the pledgeor, it only confirms the rule that, without his consent, the pledgee can not subpledge.*

221. Either in the use of the pledge, or in the subpledge, it will not do to say that, if the pledge is not damaged or injured by use, there is no objection in the pledgee using it. The same might be said of the thing deposited, and yet it is not doubtful that the depositary has no right to use the thing deposited.

222. As a distinct question from the right to subpledge, has the pledgee the right to transfer his claim against the pledgeor together with the pledge attached thereto? To this Baudry-Lacantinerie sees no objection and thinks such transfer may be made, provided that the formalities necessary for the pledge itself should be obtained. But then, he says, the security will only be relative, because the original owner of the thing pledged, the original pledgeor, has only to pay his debt to compel the restitution of the pledge.†

In reality, there is no difference as to the right of the pledgee to subpledge and his right to transfer the pledge with the claim that it secures. In both cases the pledgee is making use of the pledge. If it is done without the consent of the pledgeor, it is clearly illegal. If done with the consent of the pledgeor, there can be no question. That consent may be express or it may be simply tacit; and it may be implied either

* Laurent, *Nantissement*, Sec. 494.

† Baudry-Lacantinerie, *Nantissement*, Sec. 95.

from the nature of the thing pledged or from the custom of the place where the contract is formed.

223. According to the strict rule of the Civilians, any use of the pledge, if unauthorized expressly or tacitly by the pledgeor, is an abuse of the pledgee's possession, and entitles the pledgeor to the restitution of the thing pledged.*

* Code Napoleon, Art. 2082.
Laurent, Nantissement, Sec. 493.
Loaré, Vol. VIII, p. 106.
Pont, Nantissement, Sec. 1189.
Baudry-Lacantinerie, Nantissement, Sec. 141.

CHAPTER XVI.

THE RIGHT OF THE PLEDGEE TO USE THE PLEDGE AND TO SUBPLEDGE OR REPLEDGE UNDER THE COMMON LAW.

224. Although the source and the nature of the contract of pledge are the same under the Civil and the Common law, and in both systems the thing pledged is deposited with the pledgee only to secure the debt of the pledgor ; yet the two laws have diverged widely from each other in their understanding of the rights of the pledgee over the thing pledged. We have seen that under the Civil law the pledgee has no right to use the pledge without the consent of the pledgor, express or tacit, and that such consent will not be easily presumed by the courts, on the principle that nobody is presumed to give away a right.*

225. The rule is the other way at Common law, and it is there pretty well established that the pledgee can use the pledge for his own advantage, can subpledge or repledge it to secure his own debt, and can transfer the pledge together with the claim which it secures. This seems to be decidedly the rule both in England and in the United States. And the Common law authorities put the principle upon the ground of the right of the pledgee so to do, as a consequence of the pledge, without saying whether the right is

* *Ante*, Sec. 215

based upon the presumed consent of the pledgeor. It is evidently a departure from the nature and the original object of the pledge. It is in contradiction to the various definitions of the pledge, which all amount to this: that a pledge is a bailment, or a trust, or a deposit, of personal property, *as security of the pledgeor's debt*.*

The law-writers may not agree on the right of the pledgee to use the pledge. Judge Story qualifies that right by stating the exceptional cases in which it can be exercised. It would follow that, out of those exceptional cases, the right does not exist. And he says: "But, if the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, there the use is impliedly interdicted."†

Let us observe the contrast with the Civil law. There, the use may be impliedly *permitted*; otherwise it is interdicted naturally.

Mr. Jones' statement of the rule is also a negative pregnant with an affirmative. His opinion is, that a pledgee has no right to use the pledged chattel if his use of it will wear or injure it, so as to lessen its value. This is declaring indirectly that the pledgee may ordinarily use the pledge for his own advantage.‡ Mr. Schouler states that the only rational doctrine as to use of the pledge appears to be this: that the profits of the bailment belong to the

* Jones, on Pledges, Sec. 1.

Story, on Bailments, Secs. 329, 330.

† Story, on Bailments, Sec. 330.

‡ Jones, on Pledges, Sec. 394.

pledgeor, while the expenses swell his indebtedness to the pledgee on their mutual reckoning; that the pledgee has no right to a personal use, without permission, beyond what is incidental to the exercise of ordinary care in preserving the thing; but that this incidental use and the charge of keeping may, in trifling instances, be taken as intended for a mutual offset.*

These views of Mr. Schouler show a more faithful adherence to the true doctrine of the law of pledge, and a nearer approach to the Civil law.

226. Chancellor Kent adopts the early doctrine laid down by Lord Holt, for which he expresses great admiration, and thinks that the pledgee may use the pledge, if it is not injured by the use.†

The very reasoning of Lord Holt thus praised by Chancellor Kent, is condemned by Judge Story.‡

The doctrine supported by Lord Holt is that: ‘‘ If the pawn be such as will be worse for using, the pawnee can not use it, as clothes, etc. But, if it be such as it will never be worse, as, if jewels for the purpose were pawned to a lady, she might use them. But then she must do it *at her own peril*. For, whereas, if she keeps them locked up in her cabinet, if her cabinet is broken open and the jewels taken from thence, she would be excused. If she wears them abroad and is there robbed, she will be answerable.

* Schouler, on Bailments, p. 198.

† Kent's Comm., 2 Vol., Sec. 578.

‡ Story, on Bailments, Sec. 329.

And the reason is, because the pawn is in the nature of a deposit, *and, as such, is not liable to be used.**

To this Judge Story says: "Now, the reason here given, so far from proving that the pledgee may lawfully use the jewels, expressly negatives any such right." †

Sir William Jones and Justice Buller both affirm the doctrine that the pledgee, even if there is peril in the use of the thing pledged, may lawfully use it, but *at his own peril*. Judge Story thinks that it may well be doubted whether there is any foundation for that doctrine. ‡

227. The theory of the English judges is clearly fallacious and pervertible of the true principles of the law of pledge. The question is not what the pledgee or depositary *may* do even *at his peril*, under certain circumstances, but what he has the *right* to do under the terms of the contract, which is the law of his case. It is curious to observe that those English judges should have enunciated as a principle of law what is in reality the exclusion of such principle. Why should it be at his peril that the pledgee may use the thing pledged? Because he has no right to do so, holding it only as a depositary. And he has still less than the depositary the right to use the pledge, because the contract of deposit is formed for the benefit of the depositor, not of the depositary, whilst the contract of pledge is

* *Coggs vs. Bernard*, 2 Ld. Ray, 909, 916.

† Story, on Bailments, Sec. 330.

‡ *Id.*, *ibid.*

formed, so far as the security is concerned, for the benefit of the pledgee.

The doctrine advocated by the English judges applied to the pledge of jewelry used by the pledgee, and it could not be pretended that the nature of the thing pledged warranted the use of it. Nor was there any contention that the pledgeor had consented that it should be used by the pledgee. The decisions were, therefore, the direct and clear announcement that, by the nature of the contract of pledge, the pledgee has the right to use the pledge.

228. But Judge Story himself, who disagreed with them, does not seem to have been imbued with the true principle of the law of pledge on that point, for he said: "But, if the pledgee should undertake to pledge the property (not being negotiable securities) for a debt *beyond his own*, or to make a transfer thereof to his own creditor, as if he was absolute owner; it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee."*

This is an acknowledgment of the right of the pledgee to use the pledge, by subpledging, to the extent of his claim. And why make the distinction as to negotiable securities, when the question is one of right or abuse of right, not of power to abuse the right, with or without peril? The subpledgee of negotiable securities, if a holder in good faith, will be clearly protected against the true owner, as holders in

* Story, on Bailments. Sec. 324.

good faith of negotiable paper always are, whatever the source from which they hold. But the pledgee has no more right (if he has the power) to use the negotiable securities than any other property pledged, and he is fully as guilty of the breach of trust when he uses the negotiable securities without the consent of the pledgor as when he uses any other property pledged to him.

The dominant idea in the Common law on that subject has been and is still, not what the pledgee has the right to do, but what the pledgor can or can not do, when the thing pledged is used without his permission or consent, to recover it from the subpledgee.

229. The preponderance of authority in the United States is clearly that the pledgee may subpledge or repledge the thing he holds in pledge, to secure his own debt, which is a corollary of the rule that he may make use of it.

The cases in which it has been so decided do not seem to discriminate between the *right* of the pledgee to use the pledge, or to subpledge, and his *power* to do so, having in his hands the disposition of the thing pledged. On principle it is clearly against the nature and principles of the contract of pledge, and the pledgee can only subpledge at his own peril. *

The pledgee may not have the right to subpledge, and yet the pledgor may not have the power to

* Talty vs. Savings and Trust Company, 3 Otto, 321.
Jarvis' Adm., vs. Rodgers, 15 Mass. 369.
Lewis vs. Mott, 36 N. Y. 395.
Donald vs. Suckling, Law Rep., 1 Q. B. 585.

attack the subpledge, so that the rights of the subpledgee may be good against him.

230. In the pledge of negotiable paper, the law merchant is paramount, as it is in the purchase or discount of such paper, and this is as much so in the countries of Civil law as in those of Common law. The pledgee who has taken negotiable paper before maturity, in the usual course of business, that is, without notice of an adverse right, and for a valuable consideration, can hold it against the true owner. But this rule will form the subject of a separate chapter.

CHAPTER XVII

TORTIOUS PLEDGE OF ANOTHER PERSON'S PROPERTY.

231. As to the pledge of personal property, other than negotiable paper, by any other person than the true owner, and without the latter's consent, the law is the same in the United States, including the State of Louisiana, in England and in some countries of Europe. Under the principle that nobody can transfer a right that he does not himself possess, the fraudulent or unauthorized pledge does not affect the true owner. He can recover his property against the pledgee, even when the latter is in good faith, is without notice of the adverse right, and has given full value for the pledge.*

232. But in France, and in Belgium, Holland and Italy, which have followed the French law in that respect, the rule is that, for personal or movable property, possession is equivalent to title. "*En fait de meubles, possession vaut titre*," says the Napoleon Code. The maxim of the Roman law on this point is *Mobilia non habent sequellam*. Consequently, in France, Belgium, Holland and Italy the pledgee or purchaser in good faith of personal property fraudulently disposed of has a valid title against the true

* Stern Bros. vs. Bank, 34 La. An. 1119.

Bird vs. Cockrem, 28 La. An. 70.

Henderson vs. Case, 31 La. An. 215.

Jones, on Pledges, Secs. 54, 55, 56.

Benjamin, on Sales, Sec. 6 *et seq.*

Tiedman, on Sales, Sec. 310 *et seq.*

owner. The French did not take this rule concerning personal property from the Romans, with whom it was not well established, but from the Germanic customs of the Franks, who invaded the Gauls.* Curious enough, the modern Germans have not adopted or retained the principle, and it does not exist in Prussia, except in the sale or pledge made by a merchant in the course of his business,† as we will see hereafter. In this as in other matters, the Gauls abandoned the Roman law, whilst Germany retained it.‡

233. In Louisiana the framers of the Civil Code refused to follow the French law on this subject, by suppressing the maxim *En fait de meubles possession vaut titre* from Art. 2279 of the Code Napoleon, in adopting the remainder of the article. The jurisprudence of that State has firmly established the rule that the true owner can recover his property fraudulently pledged to a pledgee in good faith.§

234. Thus, a citizen of the United States, having personal property in the hands of an agent in France, would have no recourse against the pledgee of the same in good faith, if it were fraudulently pledged by the agent for his own account. And a citizen of France having personal property in this country, in the hands of an agent, could recover it from the

* Troplong, Prescription, Vol. 2, Sec. 1040 *et seq.*

† De St. Joseph, Concordance de tous les Codes, p. 124 *et seq.*

‡ Montesquieu, Esprit des Lois, Vol. 3, p. 66.

§ Louisiana Code, Art. 3506.

Code Napoleon, Art. 2279.

Stern Bros. vs. Bank, 34 La. An. 1119.

pledgee in good faith of the agent, who would have fraudulently pledged it for his own account. I speak, of course, of personal property in this case, other than negotiable paper.

235. Let us see now the reasons given in support of the different systems by their respective promoters.

Troplong says: "In such cases the true owner has only himself to blame for having misplaced his confidence. He has no right of action against the third person in good faith who has acquired the movable property. Otherwise there would be no safety in business."

And again: "But if the thing pledged has been subpledged by the creditor, it is established that the subpledgee has all the rights of a pledgee. The doctrine is founded on the wise and protecting principle of the French law: *movables have no following*." *

236. Laurent expresses a similar opinion: "It is true to say that movables pass rapidly from hand to hand. The possessor of a movable effect sells it; in a few weeks it may be transferred to ten different purchasers. If the true owner could claim it against the last purchaser, ten lawsuits would follow. Public order requires that this should be avoided. It is a necessity of commerce." †

237. It is proper to note that such is clearly the law in France only since the promulgation of the Code Napoleon.

* Troplong, *Nantissement*, p. 74 and p. 392.

† Laurent, *Droit Civil*, Vol. 32, p. 553.

It is also well to observe that the rule only applies to corporeal movables, and to choses in action transferable by delivery; and, further, that in case such property was lost or stolen, the true owner can claim it from the vendee or pledgee in good faith during three years from the time of the loss or theft.*

THE COMMON LAW VIEW OF THE SUBJECT.

238. Mr. Jones, in his excellent work on the Law of Pledges, says: "Mere possession of a chattel, though indicative of title, is not title; and one taking a pledge of it is bound to satisfy himself that the pledgeor is the owner; and if he relies solely upon the pledgeor's possession, he takes the risk of having to surrender the property to the true owner. * * * If one holding goods for safekeeping pledges them with intent to convert the proceeds to his own use, he, in effect, commits a larceny, and the pledgee acquires no title as against the owner, although he deals with the pledgeor in good faith."†

239. Mr. J. P. Benjamin, in his book on the sale of personal property, says:

"In general no man can sell goods and convey a valid title to them unless he be the owner. *Nemo dat quod non habet*. A person, therefore, however innocent, who buys goods from one not the owner, obtains no property in them whatever (except in some special

* Code Napoleon. Art. 2279.

Baudry-Lacantinerie. Nantissement. Secs. 30, 31.

† Jones, on Pledges. Sec. 54.

cases presently to be noticed) ; and even if in ignorance of the fact that the goods were lost or stolen, he resell them to a third person in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon.”*

* Benjamin, on Sales, etc., Sec. 6.
Agnew vs. Johnson, 22 Pa. St. 471.
Gottlieb vs. Hartman, 3 Colo. 53.
Vermilye vs. Adams, 21 Wall. 143.
Texas vs White, 7 Wall. 700.

CHAPTER XVIII.

RIGHT OF PLEDGEOR TO DEMAND THE RESCISSION OF THE CONTRACT AND RESTITUTION OF THE PLEDGE IF PLEDGEE MAKES USE OF THE THING PLEDGED WITHOUT HIS CONSENT.

240. The contract of the pledge contains, like all contracts in the Civil law, the implied, if not expressed, understanding, and resolutory condition, that the violation of the agreement by one of the parties entitles the other party to the rescission of the contract. It follows hence that, if the pledgee, without the pledgeor's consent, makes use of the pledge for his own pleasure or benefit, whether the thing pledged is thereby damaged or not, the pledgeor, under the Civil law, has the right to annul the contract and demand the return of the pledge, because the use made of it by the pledgee is a violation of the agreement. The unauthorized use is an abuse, even if no damage follows. Laurent is emphatic in his opinion on that point. The Napoleon Code provides that "The debtor can not, *unless the creditor abuses the pledge*, demand the restitution of it before he has entirely paid, principal and interest, the debt for which the pledge has been given."*

241. Commenting upon this article, Laurent says :
" Art. 2082 consecrates a consequence of that princi-

* Code Napoleon, Art. 2282.

ple (that the pledgee has no right of use). In general, the debtor can not command the restitution of the pledge before he has paid the debt. There is an exception, says Art. 2082, when the pledgee *abuses* the thing pledged. What is understood here by abuse?

* * * The sole fact to use the thing is an abuse, inasmuch as the creditor does what he has no right to do."*

And again, the same writer says: "That has nothing in common with the undue use which the pledgee makes of the thing. If he used it with all the care of a good administrator, he would not the less be guilty of abuse, for it is abusing to do what one has no right to do."†

242. Other commentators of the Napoleon Code do not take this extreme view of its Art. 2082. Pont, at the same time that he recognizes in the article the consecration of the principle of the resolutive condition in contracts, says as to the abuse of the pledge by the pledgee: "Thus, the law does not anticipate only the case in which the creditor would make an excessive use of the thing; it extends to all cases where he would imperil the thing, and to all cases in which he would make of it a use contrary to the law, to honesty and to good morals. In other words the abuse of the thing in any manner whatever affects the resolutive condition and takes away from the creditor the benefit of the right of retention."‡

* Laurent, *Nantissement*, p. 492.

† *Id.*, *Ibid.*

‡ Pont. *Nantissement*, Secs. 1189, 1190.

This language implies evidently that, in the opinion of the writer, a moderate and uninjurious use of the thing pledged does not give to the pledgeor, under the terms of the article, the right to demand the restitution of the pledge.

243. But Baudry-Lacantinerie, the most recent of the French commentators, seems to side with Laurent, for he says, on this article: "By this expression *to abuse* we must understand at the same time the case when the creditor makes use of the pledge without being authorized, and that when he exceeds the limits of his authority and makes an abusive use of the thing."*

244. The right of the pledgeor to demand the return of the pledge in case the pledgee makes an illegal use of it, is in the nature itself of the contract, as it is in the nature of the contract of lease or hire, that the lessor has the right to demand the surrender of the leased premises if the lessee makes an improper or unwarranted use of them. It is found in the French law preceding the Code Napoleon as well as in that Code, and it is found in the Roman law, from which the modern Civil law has received it.

Pothier stated both the law of France of his time and the Roman law from which it came. "There is a case to which the *pignoratitia* action is opened and may be brought for the restitution of the thing given in pledge, though the creditor is not yet paid or satisfied: it is that in which he would abuse the thing

* Baudry-Lacantinerie, Du Gage, p. 69.

pledged. Ulpian gives us this example of it: *Si prostituit ancillam, vel aliud improbatum facere coegit, illius pignus ancillæ solvitur. L. 24, Sec. 3, ff. d. tit.*" Under the Roman law a slave could be given in pledge, and, if a woman, the prostitution of her was an abuse of the pledge.

It is evident that under the general principles of the law of contracts, even in default of special statutory provisions, the abuse of the pledge by the pledgee entitles the pledgeor to the restitution of the thing pledged. The nature and extent of the abuse is a matter for the appreciation of the court or jury, according to the more or less stringent rules of the Civil law, which governs the contract of pledge.

245. Mr. Pont states, in connection with the right of the pledgeor to demand the restitution of the thing pledged if the pledgee abuses it, that the article of the French Code is only the special application of that general principle which extends to all onerous contracts, that the resolutive condition is always understood in the synallagmatic contracts whenever one of the parties does not fulfil his engagement.*

246. The Civil Code of Louisiana, like the Napoleon Code, provides for the resolutive condition in these terms: "A resolutive condition is implied in all commutative contracts, to take effect in case either of the parties do not comply with his engagements; in this case, the contract is not dissolved of right; the party complaining of a breach of the con-

* Pont, Nantissement, Sec. 1189.

tract may either sue for its dissolution with damages, or, if the circumstances of the case permit, demand a specific performance.”*

247. The same principle forms part of the Common law. Although the Civilians have perhaps expounded the law of contracts more elaborately and more scientifically than the English and American jurists have done it, yet the same rules of reason and justice govern both systems. A breach of the contract, or the failure to perform his engagement by one of the contracting parties entitles the other party to the rescission of the contract under the Common law as well as under the Civil law. This right if not expressed in the agreement is implied in the understanding of the parties, and the principle may be invoked by the complaining party. The resolutive condition of the Civilians is nothing else. It is, under different terms, the breach or failure of the condition precedent in the Common law.†

248. Such being the case, how should we understand the words of Chief Justice Cockburn in the case of *Donald vs. Suckling*, in which the question was, whether the transfer of the pledge by the pledgee without the pledgeor's consent, entitled the latter to the rescission of the contract, and, consequently, to the restitution of the thing pledged. The Chief Justice said: “I think it unnecessary to the decision in

* Civil Code of Louisiana, Art. 2046.

Code Napoleon, Art. 1184.

† Chitty, on Contracts, 4th Am. Edition, p. 572.

Parsons, on Contracts, 6th Edition, Secs. 677, 678.

Wharton, on Contracts, Sec. 919.

the present case to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgeor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged, as in the case of a valuable work of art, that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case.

“The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action,—for nominal damages if he has sustained no substantial damages; for substantial, if the thing pledged is damaged in the hands of the third party,

or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien, for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time. It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor can not treat the contract as at an end until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him." *

249. With all the respect due the high authority of the English judge, we can not tamely submit to his doctrine. It is a denial of the right of obligations. It is a departure from the sanctity of engagements. Had it been said in the opinion that, by the established jurisprudence of the Common law, the pledgee had the right to use the pledge, to subpledge or repledge

* *Donald vs. Suckling*, L. R. 1 Q. B., p. 617.
Jones, on Pledges, Sec. 420.

it, and to transfer it to another party, criticism would have been out of place. But, to hold that the pledgee has *violated* the contract by the transfer and that the pledgeor has yet no right to demand the rescission, and, as a legal consequence thereof, to claim the restitution of the pledge, is subversive of the fundamental principles of the law of contract. Those principles govern alike all contracts, the contract of pledge as well as the contract of hire. Would it be said, if a person hires my horse with the understanding that he shall only ride him two hours a day, and he rides him eight hours a day, there being thereby a breach of the agreement, I can not demand the rescission of the contract and the return of the horse; and that I am relegated to a suit for damages? Or that, if I grant a lease of a house as a residence for a family, the lessee may turn it into a brothel; and that I have no right to rescind the lease; but must be satisfied with a demand for damages. The very doctrine of the right of rescission on account of the breach of contract repels such a theory.

250. The views of Justice Mellor in the same case, on the right of the pledgee to use the pledge, are also remarkable. After holding that the pledgeor is not entitled to the restitution of the thing pledged on account of the unauthorized transfer made by the pledgee, and that he can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods, the English judge says: "And I think that such is

the true effect of Lord Holt's definition of a 'vadium or pawn,' in *Coggs vs. Bernard*; although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrongdoer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place." *

251. Are we to understand from this that the English law of pledge is, and has been from the time of Lord Holt, that the pledgee may not only use, but also *misuse* or *abuse* the pledge, before payment, without the pledgeor having the right to demand the rescission of the contract; and that his only remedy is a claim for damages?

252. Justice Blackburn, in the same case of *Donald vs. Suckling*, lays his opinion upon the principle that the contract of pledge, creating an interest in the pledge, which may be assigned, the subpledging is not in general so inconsistent with the contract as to amount to a renunciation of that contract." †

253. Justice Shée, in the same case, dissented, and denying the right to transfer the pledge, or to subpledge, said very pointedly:

* *Donald vs. Suckling*, L. R. Q. B., p. 610.

† *Donald vs. Suckling*, 1 L. R. Q. B., pp. 610 *et seq.*

“If the pawnee may repledge the pawn the subpledgee may do the same, and so on *ad infinitum*. To whom then is the original pawnor to apply? The relation between the pawnor and the pawnee is of a fiduciary and personal character, and until the time for redeeming the pledge has elapsed the pawnee is bound to keep the pawn.”*

254. We may conclude from the English and American authorities that the common jurisprudence has established the rule that the pledgee may use (not abuse), repledge or subpledge, and transfer the pledge, without the consent, express or implied, of the pledgeor. And it is curious to observe that the fundamental principle of the Civil law on this subject, that the thing pledged being put in the hands of the pledgee only as a deposit and for the sole purpose of securing his debt, he can not draw any other advantage or benefit from his possession; it is curious to observe, we say, that this principle, which is of the nature of the contract of pledge, does not seem to have been of any weight or consideration with the courts of the Common law.†

* Donald vs. Suckling, 1 L. R. Q. B., p. 589.

† Coggs vs. Bernard, 2 Ld. Ray, 909 *et seq.*

Halliday vs. Holgate, Exchequer, Vol. 3, 297.

Donald vs. Suckling, L. R. 1 Q. B. 585.

Johnson vs. Stear, 15 C. B. N. S. 330.

Ogden vs. Lathrop, 65 N. Y. 185.

Lawrence vs. Maxwell, 53 N. Y. 19.

Whitaker vs. Sumner, 20 Pick. (Mass.) 399.

Cooper vs. Ray, 47 Ill. 53.

CHAPTER XIX.

RIGHT OF OTHER CREDITORS OF THE PLEDGEOR TO SEIZE THE PLEDGE.

255. The thing pledged is put in the possession of the pledgee to secure his claims and to create his privilege or lien against other creditors of the pledgeor. By the terms of the contract of pledge and by the law, the pledgee has the right to retain this possession until his debt is paid. But, here again, we find a great difference between the Civil law and the Common law.

In the Civil law, this right of retention only exists between the pledgee and the pledgeor. It does not bind other creditors of the latter to the extent that they can not demand that the thing pledged, if it is of a value more than sufficient to pay the pledgee, should not be surrendered by him and be judicially sold, subject to his right of preference over the proceeds.

Troplong states the French law on this point in these words: "But, shall this right of retention of the pledgee be applicable to third persons in good faith, who have executory rights and have an interest in the sale of the thing pledged? Can the pledgee oppose his right of retention to them and send them off to be paid as they can? Not at all!

"From the principle that the right of retention can be opposed only to the pledgeor and not to third per-

sons, it follows that though the pledgee is in possession of the pledge, the other creditors with executory rights can seize the thing pledged in his hands, cause it to be sold against his will and convert it into money, reserving his right of preference over the proceeds.’’*

256. Laurent expresses the same opinion on the right of the other creditors of the pledgeor to cause the pledge to be seized and sold, subject to the lien of the pledgee.

And he explains it as follows: Can the pledgee oppose his right to retain the pledge until payment to the other creditors? Clearly not. The right of retention is foreign to the creditors, because there is no conflict between them and the pledgee until the latter claims his privilege and asks to be paid by preference over the other creditors of the common debtor. Now, the right of retention is distinct and different from the privilege; therefore the pledgee can not avail himself of it against the other creditors; and these may exercise their rights regardless of the right of retention. Which is the right of the creditors? They may seize the property of their debtor; they may, therefore, seize also the thing which he has pledged because he remains the owner of it. This right of seizure, and the forced sale which is the consequence of it, can not be impeded by the right of retention of the pledgee; all that this one can demand when there is a conflict between him and other creditors, is to be

* Troplong, *Nantissement*, Secs. 458, 459.

paid by preference; but the privilege does not prevent the creditors from seizing the pledge, because the seizure does not impair the rights of the pledgee. When the thing is sold, a concourse takes place in Court between the creditors for the distribution of the price, and the pledgee is paid first and in full, as it is over the price of the pledge that he exercises his right of preference. This right, then, far from being ignored, is realized. It is the same thing of all privilege or mortgage creditors. The real rights which are attached to the property affected by the privilege or the mortgage do not prevent ordinary creditors from acting; they can proceed to the expropriation of the common debtor; but when it will come to the distribution of the proceeds, then a concourse will be opened and the mortgage and privilege creditors will be paid by preference over the rest.*

257. Pont expresses the same views on this subject. The contract of pledge, from which the retention arises, is personal to the pledgeor and the pledgee. The other creditors are not parties to it. They can not be bound by it further than by the privilege the law gives the pledgee. No person can put his property beyond the reach of his creditors by encumbering it with any right or cause of preference in favor of any particular creditor. The right of preference, if legal, should be respected, but that is all that the preferred creditor can demand. The property itself is answerable for all the debts of the owner, and is subject to the action of all his creditors.

* Laurent, Nantissement, Sec. 502.

But this right of the other creditors can only be exercised when, from the circumstances of the case, the nature of the thing pledged, its value and the amount of the debt secured, the seizure and sale demanded by the creditors could not in any manner impair or destroy the rights of the pledgee. If, for instance, the value of the pledge is manifestly less than the debt, or if the very offer of the pledge at the public sale would diminish its value beyond the amount of the debt; in fact, under any circumstances, which would impair or affect the pledge to the prejudice of the pledgee, the other creditors would not be entitled to the seizure and sale. *

258. In the jurisprudence of Louisiana this principle has become axiomatic, and has been firmly established by an unbroken line of decisions.†

This jurisprudence is based upon the principle, as shown by the commentators of the Code Napoleon, that the contract between pledgeor and pledgee secures the right of retention only against the pledgeor, but not against his other creditors; and that the debtor has no power to take his property out of the reach of all his creditors, which is, in a broader sense, *their common pledge*. All that the pledgee can demand is

* Pont, Nantissement, Sec. 1186.

Baudry-Lacantinerie, Nantissement, Sec. 248.

† Kirkpatrick & Co. vs. Oldham, 38 La. An. 553.

Honor vs. Sheriff, 34 La. An. 389.

Angé vs. Variol, 31 La. An. 865.

White vs. Blanchard, 19 La. An. 62.

James vs. Breaux, 26 La. An. 265.

Marot vs. Husband, 18 La. An. 665.

Wallis vs. Boove, 14 La. An. 104.

Fisher vs. Gordey, 11 La. An. 275.

that his lien, or privilege, or right of preference over the proceeds of the pledge, should be and remain unimpaired; and that is done when the full amount of his claim is satisfied from the seizure and sale of the thing pledged. It follows from this rule that no adjudication can be made at the judicial sale of the pledge if the amount bid does not cover the debt of the pledgee and the costs of the proceedings. This is clearly doing justice to all, to the pledgee as well as to the other creditors. The law is therefore wiser and better than the contrary rule of the right of absolute retention in the pledgee.

In one of the cases cited above, the Court of Louisiana says: "It is now well settled in our jurisprudence that the property of any nature held in pledge by a creditor may be seized from his possession by another creditor of the common debtor and sold subject to the pledgee's claims. The only right which the law secures to the pledgee is to satisfy his debt 'by privilege and in preference to other creditors of his debtor out of the product of the movable, corporeal or incorporeal, which has been thus burdened.' Nothing in the nature of the contract can authorize the pledgee to hold indefinitely the property pledged, which is usually far in excess of the amount thereby secured, and to thus deprive other creditors of their recourse on the debtor's property." *

* *Hornor vs. Sheriff et als.*, 34 La. An. 389.

AT COMMON LAW OTHER CREDITORS CAN NOT
SEIZE THE PLEDGE.

259. By the Common law, the thing pledged is beyond the reach of other creditors of the pledgeor. The right of retention of the pledgee is absolute, as well against third persons as against the pledgeor. The pledgeor having, by the contract, only the right to redeem, his creditors are bound by the terms of the pledge. They can neither seize nor attach the thing pledged, nor garnishee the pledgee. They are bound and made to suffer by an agreement between pledgeor and pledgee, to which they were no parties, and by which the property of their debtor, *their common pledge*, may be forever taken away from them, though there might be left a surplus to pay them, after seizure and sale of the pledge and satisfaction of the pledgee's claim.*

How far superior and more equitable is the rule of the Civil law in this respect, which, at the same time, maintains the rights of the pledgee intact and unimpaired and protects those of third persons!

The proof of that superiority lies in the fact that in several States of the Union statutes have been passed on that subject granting to the creditors of the pledgeor the right to seize or attach the pledge, subject to the lien of the pledgee, departing, in that respect, from the Common law, and adopting the principle of the Civil law. †

* Jones, on Pledges, Sec. 372.

† Jones, on Pledges, Secs. 372 *et seq.*

PLEDGEE IS NOT BOUND TO SURRENDER THE PLEDGE
TO ASSIGNEE OR SYNDIC OF PLEDGEOR.

260. It is a condition precedent of the right of the other creditors to cause the pledge to be seized and sold, that a showing be made by them of the surplus value of it over the debt of the pledgee.

The rule is not changed by the assignment in bankruptcy, or surrender of his property by the pledgeor subsequently to the pledge. His assignee, or the syndic of the creditors, has no right to take the pledge out of the hands of the pledgee and include it in the assets of the insolvent for the purpose of winding up the concern. *

This was declared by the Supreme Court of the United States to be the Common law as well as the law of Louisiana. †

The pledgee has, even after the assignment or surrender of his property by the pledgeor, the right to foreclose the pledge under the terms of his contract. All that the assignee or syndic of the creditors can do is to act against him in court and demand that he should foreclose his pledge and turn over the surplus of the proceeds to the representative of the creditors. The principle that the pledgee's right of retention is not impaired by the pledgeor's assignment in bankruptcy is expressed by the Supreme Court of the United

* Renshaw vs. Creditors, 40 La. An. 37.

† Yeatman vs. Savings Institution, 95 U. S. 766.

Jerome vs. McCarter, 94 U. S. 734.

Donaldson vs. Farwell, 93 U. S. 631.

States in the following words: “ The assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt. He takes the property in the same ‘ plight and condition ’ that the bankrupt held it. The assignee takes only the bankrupt’s interest in the property. He has no right or title to the interest which other parties have therein, nor any control over the same further than is expressly given to him by the Bankrupt Act, as auxiliary to the preservation of the bankrupt estate for the benefit of his creditors. It would be absurd to contend that the assignee in bankruptcy became *ipso facto* seized and possessed in entirety, as trustee, of every article of property in which the bankrupt has any interest or share.” *

261. In a case arising under the State Insolvency laws of Louisiana, in which the syndic of creditors demanded the surrender of the pledge as part of the assets of the insolvent, the Court said: “ This right of retention is an essential constituent of the *jus pignoris*. It has been held that this right is not operative, as against creditors of the pledgeor, to prevent them from seizing and selling the pledged property so as to liquidate the debt and secure any possible surplus. No doubt the syndic of an insolvent pledgeor might, on proper showing and by proper proceeding, force a similar liquidation, so as to secure any possible *residuum* for the creditors, as was done by the decree of the Court in the case of Brother vs.

* *Yeatman vs. Savings Institution*, 95 U. S. 766.

Saul, 11 An. 225. But it is entirely inconsistent with the pledgee's right of retention, and has never been held in this State that, by mere virtue of the cession, the syndic acquires the right to demand the surrender of pledged property to be officially administered by him and subjected to the costs and burdens of such administration.'*'

262. From the principle that the assignee in bankruptcy, or syndic in insolvency, succeeds to the rights of the debtor, such as they were before his surrender or cession, and subject to all the equities which existed against him, it follows that, generally where the pledgeor could not have attacked the legality of the pledge for mere want of forms or formalities, or on account of irregularities, the assignee or syndic is equally without right or authority to do so. This is the doctrine of the Civil law, as established by the Court of Louisiana. For instance, the requirement of a written act of pledge is not indispensable so far as the parties themselves to the contract are concerned. The pledge is valid without such written act *quoad* the pledgeor, who is estopped from pleading its nullity on that ground.†

Hence it was held that the pledgeor's syndic can not set up that ground of invalidity either, against the pledgee.‡

* Renshaw vs. His Creditors, 40 La. An. 41.

† Matthews vs. Rutherford, 7 La. An. 225.

‡ Brother vs. Saul, 11 La. An. 225.

Portee vs. Corning, 9 La. An. 539.

Campbell vs. Slidell, 5 La. An. 274.

263. The rule obtains equally in the Common law, and the authorities are numerous and imposing, which declare that an assignment in bankruptcy, like any other assignment by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities : that the assignee, in such cases, stands in the place of the bankrupt ; that the rights of the latter are the rights of the former ; and hence, that the mortgages or the pledges, or other contracts of the bankrupt which he could not have attacked, the assignee can not attack, provided that, in all such contracts or acts of the bankrupt, there was no fraud or dishonesty.*

264. But the doctrine, under either system of law, is not without its difficulties. Justice Bradley in the often cited case of *Casey vs. Cavaroc*, shows those difficulties and indicates clearly how the rule should be applied. He says : “ Whilst it is generally true that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor or assignor held it, it is not universally true. Many transactions would be binding on the latter which would not be binding on the assignee. All sales and securities made for the actual purpose of defrauding creditors are of this class. By the law of Louisiana, a pledge, in order to be effective against

* *Cook vs. Tullis*, 18 Wall. 332.
Gibson vs. Warden, 14 Wall. 244.
Casey vs. Crédit Mobilier, 2 Woods, 77.
Mitford vs. Mitford, 9 Ves. Jr. 87.
Mitchell vs. Winslow, 2 Story, 630.
Jones, on Pledges, Sec. 585.

third persons, must be accompanied by a privilege. It may be valid as a contract between the parties without this quality, as held both in the French law (as already shown), and in Louisiana, in the case of *Matthews vs. Rutherford*, 7 La. An. 225. But Art. 3162 expressly declares that the privilege arising from a pledge does not subsist except when the thing pledged has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties. Without the privilege, or right of preference, the *Crédit Mobilier* has no claim to hold the securities in question as against the other creditors. How, then, can it set up such a claim against the receiver? The receiver does not represent the bank alone; he represents all the parties. He represents the law, which takes charge of the property for the benefit of all creditors according to their respective and mutual rights. Suppose no receiver had been appointed, and, when the bank failed, it had called the creditors together and laid all its assets on a table, could the *Crédit Mobilier* in presence of the other creditors have laid its hands on the securities in question and claimed them by right of any privilege or preference? It certainly could not have done so if it had no privilege as against them. And yet this is precisely the relation in which the parties stood. The existence of a receiver, as trustee for all, did not change it. That one essential thing which the law requires for the subsistence of the privilege, namely, possession, was wanting. Other

formalities might have been dispensed with. But, possession is essential—made so by the express terms of the law. Nearly all the cases in France, where this question has arisen, have been contests between creditors claiming by way of pledge and the syndics of the failing debtor, who stand in the place occupied by the receiver here. If there is any distinction between them it is in favor of a firmer right on the part of the receiver to protect the interests of the general creditors. He is not made receiver by a voluntary assignment of the bank, but is appointed by the magistrate *in invitum* the bank, for the very purpose of securing equal justice to all its creditors and under a law which sternly forbids preferences. Surely such an officer, whatever may be the rule in the case of voluntary assignments, may assert those rights of the general creditors which the law itself creates, without being subject to all the disabilities under which the bank would labor in combating its private engagements with favored creditors. If the law says ‘there shall be no privilege, as to third persons, by a pledge without possession,’ there will be no need of a judgment and execution in order to oppose such a pledge, if only a creditor, or one who represents creditors, has a proper standing in court. Insolvency of the debtor, if a bank, and the appointment of a receiver thereof, will force the pledgee into concurrence with the general creditors; and the receiver’s power will be fully adequate to the protection of their interests as established by law. The case of *Bank of Alexandria vs. Herbert* (8 Cranch,

36), presents a state of things almost precisely analogous to this. There, the trustee of an insolvent debtor recovered the proceeds of property which the latter had mortgaged to the bank. The recovery was had on the ground that the mortgage had not been recorded in proper time under the law of Virginia, which declared that all deeds and mortgages, though good between the parties, should be void as to creditors and subsequent purchasers without notice, unless recorded within eight months from date. 'To set up this deed against the creditors,' said Mr. Chief Justice Marshall, 'would be to defeat the very object for which the law was made.'

"Indeed, it may be laid down as a general rule, as well at the Common law as at the Civil law, that a trustee, assignee or syndic, having the powers and occupying the relations which are sustained by a receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a *bona fide* purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. That an assignee in bankruptcy has this power can not well be doubted; and since a national bank can not be put in bankruptcy, but can only be wound up under the peculiar provisions of the banking act, the receiver

appointed by virtue thereof must have the same power, or the absurd consequence would follow, that the property of a bank disposed of by voluntary conveyances, or pledges not good as to third persons, would be beyond the reach of creditors.

“Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; because the assignee only takes such title as the debtor has at the time of the assignment or insolvency. In that case, however, the question of fraud would be admissible as a question of fact to invalidate the transaction.” *

265. Justice Bradley took no notice in this case of a decision of the Court of Louisiana, alluded to above, and which was cited by counsel as authority in favor of the pledgee against the doctrine so well advocated by the distinguished justice of the Supreme Court of the United States. That was the case of *Brother, Syndic, vs. Saul*, 11 La. An. 225, in which the Court of Louisiana held that the syndic could not contest the validity of a pledge on the ground that no act in writing had been passed as demanded by the Civil law, and particularly by the statute law of Louisiana.† The case was decided by a divided Court, which could hardly not have been divided on the question at issue, as the law of that State expressly provides

* *Casey vs. Cavaroe*, 96 U. S. 487.

† Civil Code of Louisiana. Art. 3158.

that the contract of pledge unless evidenced by an act in writing, does not give a privilege to the pledgee, *and can not affect other creditors*. The reasoning of Justice Bradley on this point may be considered as a complete refutation of the ruling of the Louisiana Court. That Court based its judgment upon the ground that the want of the written act was a mere informality which did not invalidate the pledge. But, so far as other creditors were concerned, this was not an informality; it was the absence of an indispensable condition of the pledge, of a condition without which the pledgee was not entitled to a preference, and was placed on a level with the other creditors. If the pledgeor had not gone into insolvency, every one of those other creditors could have demanded the invalidation of the pledge for want of the written act. Is it not clear that the syndic, who is their agent under the law, to protect their rights, has the power to do for them collectively what they could have done themselves individually before the insolvency? If the syndic had not demanded the invalidation of the pledge for their account, and had, in the proposed distribution of the insolvent's assets, recognized the pledgee as a preferred creditor, can there be any doubt that the other creditors could have opposed the distribution and pleaded the nullity of the pledge on the ground that the absence of the written act deprived the pledgee of any right of preference?

CHAPTER XX.

THE PLEDGEE MUST TAKE PROPER CARE OF THE PLEDGE.

266. The pledgee is under the obligation to take proper care of the pledge, according to the nature of the thing pledged. If it is damaged or lost through his fault, he is responsible for the value of it to the pledgeor. He may even be held liable for not causing the thing pledged to produce the fruits or income which it is susceptible of producing. The Codes of France and Louisiana provide for this obligation of the pledgee in the following terms: "The creditor is answerable agreeably to the rules which have been established under the title: Of Conventional Obligations, for the loss or decay of the pledge, which may happen through his fault." *

The care which the pledgee is thus to take of the thing pledged as an implied condition of the contract, is the same which a prudent man takes of his own property; but, as this may be too indefinite, for all men, even if prudent in the administration of their own affairs, may not be so in the same degree, the law fixes the extent of the pledgee's responsibility by rendering him liable for even a light fault, but not for the lightest fault. The principle comes from the Roman law, and is stated by Pothier in these words:

* Code Napoleon, Art. 2080.
Civil Code of Louisiana, Art. 3167.

“ The care to which the creditor is bound, is only the ordinary care which prudent men usually bring into their own affairs. It is not demanded of him that he should use *exactissimam diligentiam*, of which few persons are capable ; and he is only liable for the fault they call the *light fault*, *de levi culpa* ; he is not liable *de levissima culpa*. It is what is very clearly decided by the law 5, Sec. 2, ff. *Commod.*, where the contract of pledge is expressly reported among the contracts which are for the mutual benefit of the contracting parties, in which the debtor is liable for the ordinary fault ; and they are distinguished in that from the loan, *commodatum*, which being for the sole benefit of the one who receives the loan, demands of him a greater care than the ordinary care which those contracts demand which are for the mutual benefit of the contracting parties.” *

267. The rule of the Common law is the same on this subject. Judge Story says in similar terms: “ Having considered the rights, the next inquiry is as to the duties of the pawnee. And here the question naturally presents itself, What is the degree of diligence imposed upon the pawnee, in respect to the preservation thereof? As the bailment is for the mutual benefit and interest of both parties, the law requires, upon the principles already stated, that the pawnee should use ordinary diligence in the care of the pawn ; and

* Pothier, Nantissement, Sec. 34.
 Laurent, Nantissement, Sec. 524.
 Pont, Nantissement, Sec. 1170 *et seq.*
 Baudry-Lacantinerie, Nantissement, Sec. 96.

consequently he is liable for ordinary neglect in keeping the pawn.”*

268. Owing to the principle that, at Common law, the pledgee has a right of property in the pledge, Lord Coke had declared that, if the thing pledged were stolen from the pledgee, he was not responsible to the pledgeor because *he had not to keep the thing otherwise than his own*. This doctrine was rejected and criticised by Sir William Jones. But neither the reasoning of Lord Coke nor that of Sir William Jones seem to have been accepted by Chancellor Kent and Judge Story. The true doctrine is clearly expressed by the latter in the following manner: “The true principle supported by the authorities seems to be, that theft, *per se*, establishes neither responsibility nor irresponsibility in the bailee. If the theft is occasioned by any negligence, the bailee is responsible; if without any negligence, he is discharged. Ordinary diligence is not disproved, even presumptively, by mere theft; but the proper conclusion must be drawn from weighing all the circumstances of the particular case. This is the just doctrine, to which the learned mind of Mr. Chancellor Kent has arrived after a large survey of the authorities, and it seems at once rational and convenient.”†

269. The opinion of Judge Story, that the liability of the pledgee in the preservation and care of the

* Story, on Bailments, Sec. 332.

Jones, on Pledges, Sec. 403 *et seq.*

† Story, Bailments, Sec. 338.

Kent, Comm., Vol. 2, 581.

Schouler, Bailments, p. 190.

pledge, must be measured from all the circumstances of the particular case, coincides with that of the Civilians. Mr. Pont says: "As to knowing how far his responsibility may go, it is a question of fact which must be left to the appreciation of the judges, who, in this matter, fulfil the office of jurors. We will not, therefore, enquire, with our ancient authors, what must be understood by the *light fault*, for which, according to the Digest, the pledgee is liable. The judges will have to decide, on this point, according to circumstances, the nature of the thing pledged, the character of the injurious acts; and they will pronounce in last resort if the facts proved against the pledgee render him responsible or not." *

270. From the nature of the thing pledged the pledgee would be clearly responsible if he neglected to have a promissory note, the subject of the pledge, protested for non-payment, and the endorser was discharged in consequence.† Or, if he neglected to have the mortgage, which is pledged to him, reinscribed or reregistered in proper time, and it lost its rank or effect.‡ Or, if he neglected to have a policy of insurance, taken in his name, renewed when requested by the pledgeor to do it. But there are acts of administration or preservation of the thing pledged, which, from its nature, the pledgee is not expected to do,

* Pont, Nantissement, Sec. 1172.

† Schouler, Bailments, p. 193.

Whitten vs. Wright, 34 Mich. 92.

Russell vs. Hester, 10 Ala. 535.

‡ Baudry-Lacantinerie, Nantissement, Sec. 137, p. 104
Court of Cassation, 21 November, 1894.

and for the abstention from which he can not be held liable, when such acts demand special skill or knowledge. For instance when wine, which must be treated and *nursed* in a special manner, is pledged, the pledgee is not expected to have it done, unless in case of special agreement with the pledgeor.*

PLEDGEOR IS OBLIGED TO REFUND PLEDGEE'S
EXPENSES IN PRESERVING THE PLEDGE.

271. The pledgeor, on his part, is obliged to refund to the pledgee all the necessary expenses which he has incurred to preserve the pledge. The principle is enacted in the Napoleon Code and the Civil Code of Louisiana. "On his part, the debtor is bound to pay to the creditor all the useful and necessary expenses which the latter has made for the preservation of the pledge." †

The commentators of the French Code are unanimous in their criticism of the phraseology of this article, and are of the opinion that, so far as the *necessary* expenses incurred by the pledgee are concerned, they must be refunded to him ; but that for the expenses which are merely *useful*, a distinction must be drawn, a distinction taken from the Roman law and founded upon the very nature of things. The necessary expenses, those without which the thing pledged would have perished or suffered a great loss

* Baudry-Lacantinerie, Nantissement, Sec. 139, p. 105.
Pont, Nantissement, Sec. 1175.

† Code Napoleon, Art. 2080.
Civil Code of Louisiana, Art. 3167.

of value, must be paid back to the pledgee in full; because the pledgor would have made them himself if he had remained in possession of the pledge. But, as to the expenses which were only useful, those which, though adding to the value of the thing, were not indispensable, the pledgor owes only to the pledgee the amount corresponding to the additional value of the pledge. If the pledgee has spent more than such additional value, the excess of expenses remains at his charge. The question of the additional value produced by the useful expenses is a question of fact, which is necessarily left to the appreciation of the judge, to be decided from the evidence.*

272. We should note that the pledgee has, for the payment of the *necessary expenses* incurred for the preservation of the pledge, the same privilege and right of preference over the proceeds of the thing pledged that he has for the payment of his debt itself. Such expenses are added to the debt and become part of it, and, therefore, are secured in the same manner, by the terms of Art. 2102 of the Napoleon Code, and Art. 3217 of the Civil Code of Louisiana. But this privilege, it seems, does not extend to the expenses incurred by the pledgee, which were merely useful, and not indispensable, and have, however, added to the value of the thing pledged. For the additional

* Troplong, Nantissement, Sec. 434.

Pont, Nantissement, Sec. 1176.

Duranton, Nantissement, Sec. 542.

Laurent, Nantissement, Sec. 526.

Baudry-Lacantinerie, Nantissement, Sec. 143.

Aubry et Rau, Nantissement, Vol. 3, p. 10.

Pothier, Nantissement, Sec. 61.

value, as we have just seen, the pledgeor is indebted to the pledgee, but this obligation is not secured by the pledge. Such is the opinion of Laurent and of Baudry-Lacantinerie.*

273. The correlative obligation of the pledgeor to refund to the pledgee the expenses incurred in the administration or for the preservation of the thing pledged, does not seem to have been either established or properly understood in the Common law at the time that Judge Story wrote his treatise on Bailments, for he says: "Another obligation of the pawner by the Civil law is to reimburse to the pawnee all expenses and charges which have been necessarily incurred by the latter in the preservation of the pawn, even though by some subsequent accident these expenses and charges may not have secured any permanent benefit to the pawner. No decision has been found in the Common law upon this point. If there is an express contract to pay such expenses, that would doubtless govern the case. And where the circumstances of the case would naturally lead to an implied agreement to the same effect, it would be equivalent to an express declaration. But whatever might be the rule as to ordinary expenses and charges in case of mutual silence, it would seem reasonable to presume that extraordinary expenses and charges, which could not have been foreseen, should be at the charge of the pawner. If, for instance, a horse is pawned

* Laurent, *Nantissement*, Sec. 526.
 Baudry-Lacantinerie, *Nantissement*, Sec. 145.
Id., *Des Privilèges et Hypothèques*, Sec. 478.

and he meets with an injury by accident, the expense of his cure might be justly deemed to be borne by the pawner, as they would be for his ultimate profit. So, if goods pawned, as, for instance, a ship, be injured in a storm, and expenses are necessary to preserve her from absolute foundering, such expenses would seem properly to fall on the owner.

“In respect to expenses not necessary, but still useful to the thing pawned, the Civil law pursued a middle course, and left them to be allowed or disallowed by the proper judicial tribunal, according to circumstances. If moderate and beneficial, they might be allowed at its discretion. The Common law is not supposed to invest any courts of justice with any such discretion, or to allow to the pawnee any such latitude of expenditure without the approbation of the pawner, either express or implied.”*

274. Since Judge Story's time, the Common law has advanced in this respect, and Mr. Jones tells us that a pledgee is entitled to all necessary expenses incurred in keeping and caring for the pledge; that he is also entitled to be reimbursed for all payments made to protect the property from prior liens or incumbrances, and for all necessary payments made in any other way to preserve or protect the security. Thus, if a pledgee of a policy of insurance advances money for the payment of premiums during the continuance of the pledge, he is entitled to be credited the amount of such payments

* Story, on Bailments, Secs. 357, 358.

in his account with his debtor. And assessments rightfully paid by a creditor upon stock pledged to him as collateral security are charges in the nature of expenses, and must be refunded by the debtor, as a condition precedent to reclaiming the pledge. In support of this doctrine several cases are cited by the same writer.*

Mr. Schouler entertains the same views on this subject, and cites the same authorities.†

RIGHT OF PLEDGEE TO DEMAND ANOTHER PLEDGE.

275. If the pledgee has been deceived in the nature of the thing pledged, and thereby as to the sufficiency of the security, he may demand of the pledgeor another pledge instead, or claim the immediate payment of the debt, though it has been contracted on terms of credit which have not yet matured. The Civil Code of Louisiana has expressly enacted the principle. "When the creditor has been deceived on the substance or quality of the thing given in pledge, he may claim another thing in its stead, or demand immediately his payment, though the debtor be solvable."‡

The Code Napoleon contains no provision of the sort bearing expressly upon the contract of pledge. But the same rule, as derived from the Roman law, is recognized

* Jones, on Pledges, Sec. 400.
 Starrett vs. Barber, 20 Me. 457.
 Hills vs. Smith, 28 N. H. 369.
 Railey vs. Ross, 59 Ga. 862.
 Rowan vs. State Bank, 45 Vt. 160.
 McCalla vs. Clark, 55 Ga. 53.

† Schouler, Bailments, p. 199.

‡ Civil Code of Louisiana, Art. 3174.

in the French jurisprudence, and the commentators support it by Article 1188 of the Napoleon Code, which provides that: "The debtor can no longer claim the benefit of the term (of payment), when he has failed, or when, by his own act, he has diminished the securities which he had given by the contract to his creditor."*

The source of this principle is the *actio pignoratitia contraria*, given to the creditor against the debtor to compel the fulfilment of the latter's obligations, the converse of the *actio pignoratitia directa*, given to the debtor against the creditor to compel the fulfilment of his obligations.†

276. Under this rule if the pledgeor has given in pledge a thing which does not belong to him, without the authority of the owner, and the pledgee was unaware of the fact, he may rescind the contract and demand immediate payment, or accept some other pledge instead. The security is evidently insufficient if he is exposed to the risk of losing it by the action of the true owner demanding his property. And, even in France, where the true owner can not recover his property wrongfully pledged, under the principle that the possession of personal property, or movables, is equivalent to title, it has been held that the pledgee in such cases has the right to repudiate the pledge on the ground that it is against his conscience to retain property not belonging to his pledgeor; and the

* Code Napoleon. Art. 1188.

† Ulpian, L. 1, Sec. 2, D., *De pignoratitia actione*.
Troplong, Nantissement, Secs. 29, 30.

latter can not impose upon him the obligation of retaining the pledge on the ground that he is secured because the true owner can not recover against him his property even though wrongfully pledged. But in all such cases if the creditor had knowledge of the vice or defect in the thing pledged, or if he himself was in bad faith in the transaction, he would be debarred of the right of demanding a new pledge, or of claiming immediate payment of his debt. *

277. The Common law does not seem to contain the principle by virtue of which the pledgee, deceived in the nature or quality of the pledge, can demand another pledge in its stead or the immediate payment of his debt. Under that system the pledgee is simply relegated in such cases to an action for damages. Judge Story lays down the doctrine in these words: "If the pawn has a defect, unknown to the pawnee, which destroys its value, the Civil law gives him a right of action for another pawn in its stead. This seems highly reasonable; the Common law, however, gives no such right. But, in such a case, if there is any fraud practised by the pawner, an action for damages will doubtless lie against him, and perhaps, also, the whole contract may, at the option of the pawnee, be rescinded." †

The later writers of the Common law do not show that the rule has changed since Judge Story's time.

* Pont, *Nantissement*, Sec. 1074.
 Laurent, *Nantissement*, Sec. 440.
 Baudry-Lacantinerie, *Nantissement*, Sec. 32.
 Pothier, *Nantissement*, Secs. 57, 58.

† Story, *Bailments*, Sec. 355.

The sole remedy of the pledgee when fraud has been practised by the pledgeor, is yet to claim damages if he suffers any. But the only damage that the pledgee can suffer from the deficiency of his security, is the loss of the money loaned to the pledgeor. His suit for damages amounts, therefore, simply to a suit for the recovery of his debt. If the debtor is solvent, the creditor recovers his money and suffers no damage. If the debtor is insolvent, the creditor obtains a judgment for damages, but does not recover his money. The remedy is therefore purely illusive. And if the pledgeor has not been guilty of fraud in giving the pledge, which yet is defective and insufficient, or worthless, the pledgee has no action for damages. In that case he can only demand the return of the loan when the same becomes due. The position, right and remedy of the pledgee are therefore the same so far as the security is concerned, whether the pledgeor has been guilty of fraud or not in inducing the pledgee to accept a worthless pledge.

CHAPTER XXI.

POWER-OF-ATTORNEY TO SELL THE PLEDGE NOT REVOKED OR ANNULLED BY THE BANKRUPTCY OR DEATH OF PLEDGEOR.

278. In the event of the bankruptcy or death of the pledgeor, the power of attorney given by him to the pledgee, or to some third person in the interest of the pledgee, to sell the pledge, when in default, and satisfy the debt from the proceeds, is not revoked or annulled by the bankruptcy or death of the pledgeor, under the principles of the law of agency. The power of attorney in that case is of the kind known in the Common law as “coupled with an interest,” and in the Roman law as that of the *procurator in rem suam*. It is not under the rule which we have just considered, that the pledgee is not bound to surrender the pledge to the assignee of the pledgeor. It is under an exception to the rule of the law of agency that the bankruptcy or death of the mandator puts an end to the mandate.

The procuration, in such case, being given in the interest of the pledgee and for a consideration, forms part of the contract, enters into its obligation, and is no more revocable by the bankruptcy of the mandator than at his will. In the contract of pledge, when the pledgeor appoints either the pledgee himself or a third person his agent to sell the thing pledged in default of payment, it is precisely in view of the

pledgeor's insolvency or bankruptcy, or death, that such power of attorney is stipulated for by the pledgee as a consideration for the loan, in order to save him from the consequences of its revocation.

279. In case of bankruptcy, the Supreme Court of the United States said on this subject: "The position that the pledgee could not sell the pledge after the adjudication in bankruptcy, is quite untenable. It is sustained by nothing in the Bankrupt Act. The bonds were negotiable instruments. They passed by delivery, and even were there no expressed stipulation in the contracts of pledge, that the pledgee might sell on default of the pledgeor, such a right is presumable from the nature of the transaction. Certainly the Bankrupt Act has taken away no right from the pledgee secured to him by his contract." *

280. The Court of Louisiana, commenting upon the article of the Civil Code of that State which provides that a power of attorney is revoked by the death or insolvency of the mandator, says: "The article was copied from the Code Napoleon and was a principle equally of the Roman law and of universal jurisprudence. It has been universally held that it did not apply to what, at Common law, are known as powers coupled with an interest, corresponding to those which, in the terminology of the Roman law, made the mandatory a '*procurator in rem suam*.' Thus the French Court of Cassation held that a mandate conferred in the interest of the agent as well as

* Jerome vs. McCarter, 94 U. S. 739.

of the principal, and as a condition of a contract passed between them, is essentially irrevocable, and is not revoked by the failure of the principal.” *

And the Court cites in support of its opinion authorities taken equally from the Civil and the Common law, showing the perfect accord of the two great systems on this subject,† so far as the bankruptcy of the pledgeor is concerned. But in case of the death of the pledgeor or mandator, we will see that they are wide apart, on the principle of the *kind of interest* coupled with the power of attorney, which renders it irrevocable.

281. As far back as the year 1823, the Supreme Court of the United States, in the well-known case of Hunt vs. Rousmanier's Administrators, said that the power of attorney given by a mortgageor to the mortgagee to sell the property mortgaged, for the purpose of paying himself, was not revoked by the death of the mortgageor, because such power of attorney was coupled with an interest.

In that case Chief Justice Marshall, who delivered the opinion of the Court, drew a very fine distinction, perhaps more subtle than real, between the “interest in the subject on which the power is to be exercised and the interest in that which is produced by the exercise of the power.” The substance of the very learned and metaphysical dissertation of the great Chief Justice on that subject is that the power to sell,

* Renshaw vs. Creditors, 40 La. An. 40.

† Allen, Bush & West vs. Nettles, 39 La. An. 791.

Jacquet vs. His Creditors, 38 La. An. 863.

coupled with an interest is only irrevocable by the death of the principal if his title to the property had been conveyed to the agent, as in the case of a mortgage; but that, if the power of attorney was given as security of the debt, without conveyance of the title, the interest of the creditor with which the power of attorney is coupled is not such as to survive the mandator. In other words, the conveyance to be made by virtue of the power, if the title is still in the principal, must be in his name, and that can not be done by his agent if he is dead. "The title," says the opinion, "can regularly pass out of the person in whom it is vested only by a conveyance in his own name; and this can not be executed by another for him, when it could not in law be executed by himself. A conveyance in the name of a person who was dead at the time would be a manifest absurdity."*

In that case, the power of attorney was given by the debtor to secure the creditor for sums of money loaned by him. He was authorized to sell two vessels of the debtor and pay himself; but the vessels were not mortgaged or conveyed to him. In the meantime the debtor died. The Court held that the power died with him, the interest of the creditor in it not being such as to render the power irrevocable.

282. The great authority of Chief Justice Marshall seems to have been the foundation of the American jurisprudence on this point. But there does not seem to be a

* Hunt vs. Rousmanier's Adm., 8 Wheaton, 382.

perfect harmony in that jurisprudence, and there are decisions which dissent from the doctrine established in the case of *Hunt vs. Rousmanier's Administrators*, in respect to the kind of interest coupled with the power of attorney necessary to its irrevocability. The subject, at all events, is far from being free of confusion and embarrassment. The opinion of the Court in *Hunt vs. Rousmanier's Administrators* lays down the absolute rule that the interest of the agent must be in the subject itself, not in its proceeds, and that the power to sell must have been preceded or accompanied by a conveyance or assignment of the property to the agent; in other words, that unless the legal title is in the agent at the time of the principal's death, the power of attorney is not coupled with such an interest as makes it irrevocable.

283. Judge Story has adopted this doctrine without qualification. Speaking of the revocation of the power of attorney by the death of the principal, he says: "The only admitted exception in our law, if, indeed, that properly constitutes an exception, is the case where the power or authority is coupled with an interest in the thing actually vested in the agent. The reason of this exception is entirely compatible with the general ground on which the rule is founded. It is, that the agent, having the legal title in the property is capable of transferring it in his own name, notwithstanding the death of the principal; and the death of the principal, therefore, has no operation upon his act. The power given by the principal is, under such

circumstances, rather an assent or agreement that the agent may transfer the property vested in him free from any equities of the principal, than strictly a power of attorney.'* *

284. It is therefore easy to understand and apply the rule in all cases of pledge where the contract has taken the form of a sale, or where the thing pledged has been assigned to the pledgee, as in the pledge of choses in action, or in the pledge of promissory notes endorsed and delivered by the payee. In all such cases the legal title being in the pledgee, it is evident that the death of the pledgeor will not revoke the power of attorney to sell. But what of the cases in which there is no conveyance or assignment to the pledgee? As a rule he has no legal title or qualified property in the pledge. He has possession, a right of retention and a lien, but the title remains in the pledgeor. This is elementary. Under the authority of *Hunt vs. Rousmanier's Administrators*, would his interest, as coupled with his power of attorney to sell, be insufficient to prevent its revocation by the pledgeor's death? It may be said that he has an interest in the *subject* itself, the thing pledged, to-wit: possession, retention and lien; but the authorities demand more. According to them, he must have the *title* in himself, or he can not sell the property of the dead man. It would seem that the *dicta* in the opinion of *Hunt vs. Rousmanier's Administrators* have gone too far and should not be taken to the let-

* Story, Agency, Sec. 489.

ter. And it is well to observe that, in that case, the creditor was not in possession of the property which he was empowered to sell, and that the contract with his debtor was one of security, but not a pledge.

However, the words of Chief Justice Marshall have lost none of their authority and are quoted up to the present day on that subject. *

285. But the courts have in some cases departed from the rigid rule thus established, that the power of attorney to sell is revoked by the death of the principal unless the legal title was beforehand in the agent; and they have held such power irrevocable by death when it had been given for a consideration, in the interest of the agent, even when he had neither the legal title nor the possession. †

286. The rule of the Civil law is different on this point, and under its principles the power of attorney is not revocable even by the death of the principal, the moment it is given in the interest of the agent and enters into the consideration of the contract. It is in no manner necessary that the legal title of the property to be sold by the agent be conveyed to him before the death of the principal. The fact is that the Common law tenure of property by legal or equitable title is unknown to the Civil law. The title may be simulated, lawfully or unlawfully, for a legal or illegal purpose, but it is not subject to the distinction created by the Common law. The pledgee,

* Walker vs. Walker, 125 U. S. 342.

† Mechem, Agency, Sec. 241 *et seq.*

Am. and Eng. Ency. of Law, Agency, pp. 445-6.

therefore, who holds the pledgeor's power of attorney to sell the pledge in default of payment, is in no way impeded or prevented from doing so by the death of the pledgeor, as his mandate is irrevocable to all intents and purposes. And even the creditor who has no pledge, or possession, or lien, if he hold the power of attorney to sell by virtue of a single contract of security, but for a consideration, may sell after the debtor's death, the mandate being irrevocable in that case also. The question of lien, or preference over creditors is, of course, pretermitted under such circumstances.

287. Troplong states the principle in these terms: "There are powers of attorney which are irrevocable. Such is the case of the *procurator in rem suam*." And he cites the words of Casaregis: "*Tale mandatum revocari non potest nec tacite per mortem, nec per expressam revocationem*." *

And again: "It is not always necessary that there should be an agreement to the effect that the mandate should survive the mandator. For instance, if Peter empowers you to collect certain sums of money due him, with the stipulation that you employ those sums to pay yourself the debt he owes you, this mandate shall not be revoked by the death of Peter; and his heirs shall be bound to allow its continuation. And such is the case whenever the mandate is the condition of a contract, or the means of executing an obligation." †

* Troplong, Du Mandat, Sec. 718.

† *Id.*, *Ibid.*, Sec. 737.

288. The French courts have applied the rule in several instances, whether the mandate was to collect sums of money, or to sell property of the mandator and with the proceeds to pay the debt due by him to the mandatary.* This is the very case of the creditor in a contract of security in which the Court in *Hunt vs. Rousmanier's Administrators* decided that the interest of the creditor as coupled with the power of attorney was not such as to render it irrevocable.

289. The Court of Louisiana has also applied the rule of irrevocability of the power to sell the pledge after the death of the pledgeor, in a case where the pledge was created by statute in favor of the consignee by bill of lading. The Court said: "Here we have an explicit provision that the mere fact of consignment evidenced by bill of lading shall operate a perfect and instantaneous pledge, with the absolute right in the consignee to sell and pay his debt with the proceeds, subject to no limitation except in favor of *existing* privileges, which means privileges existing prior to the consignment. It is impossible to conceive how the death of the consignor after the consignment could defeat such clear and perfect vested rights conferred by the law itself. The proposition is really not worthy of further consideration."†

* Sirey, 50, II, 161.

Rogron, Code Civil, Art. 2003, p. 2610.

† Allen, West & Bush vs. Nettles, 39 La. An. 791-2.

CHAPTER XXII.

THE PLEDGE IS BY ITS NATURE INDIVISIBLE.

290. The pledge, like the mortgage, is indivisible. Every portion of the thing pledged secures every portion of the debt. The pledgeor, therefore, can not, after paying part of the debt, demand the return of part of the securities, even if what would remain in the hands of the creditor would be more than sufficient to pay the balance of the debt. The consequence of such indivisibility is that, if the pledgeor dies during the existence of the pledge, and one of his heirs pay his proportionate share of the debt, he is not entitled to the surrender of a corresponding part of the pledge. The whole pledge, in that case, will still secure the balance of the debt due by the co-heirs. This is provided for by the Code Napoleon, the various Civil Codes of the countries of continental Europe and the Civil Code of Louisiana.*

291. In the latter State the statute prescribes that, when several things have been pawned, the owner can not retake one of these without satisfying the whole debt, though he offers to pay a certain amount of it in proportion to the thing which he wishes to get. And the provisions of the Civil Code carry the rule still farther and state that the pawn can not be divided

* Code Napoleon, Art. 2083.

Civil Code of Louisiana, Arts. 3163, 3171.

Concordance des Codes, by De St. Joseph. p. 2083.

notwithstanding the divisibility of the debt between the heirs of the debtor and those of the creditor. The debtor's heir, who has paid his share of the debt, can not demand the restitution of his share in the pledge so long as the debt is not fully satisfied. And respectively the heir of the creditor, who has received his share of the debt, can not return the pledge to the prejudice of those of his co-heirs who are not satisfied.*

292. This principle being of the nature but not of the essence of the contract of pledge, the parties may provide differently by the agreement.†

293. The principle of the indivisibility of the pledge, so well established by the Civil law, has been recognized by courts of Common law in maintaining the right of the pledgee to refuse to return some of the collateral securities to the pledgeor until the whole debt was paid. But the subject does not seem to have been of much interest to the law writers of this country, and the American jurisprudence is meagre in regard to it.‡ Yet the matter is of great importance. The contrary rule would impair the rights of the pledgee very seriously. It would violate the very letter of the law of pledge in countries of Civil law, and its very spirit in countries of Common law.

* *Morris vs. Sheriff*, 30 La. An. 1314.

Bagley vs. Sheriff, 10 Rob. La. 45.

Pepper vs. Dunlap, 16 La. 163.

† *Laurent*, *Droit Civil*, Vol. 28, p. 499, Sec. 503.

Troplong, *Nantissement*, Secs. 480, 481.

‡ *Bank vs. Laird*, 2 Wheat. 390.

Elder vs. Rouse, 15 Wind. 218.

Baldwin vs. Bradley, 69 Ill. 32.

CHAPTER XXIII.

WHAT DEBT IS SECURED BY THE PLEDGE.

294. In the contract of pledge, as in all contracts, it is the consent of the parties, their intention as to the subject of the agreement, which makes the contract. The pledge, therefore, only secures the particular debt of the pledgeor which he and the pledgee together intend to secure. In consequence of this principle, if during the existence of the pledge, the pledgeor becomes indebted to the pledgee on some other account, the latter has no right to retain the securities after the first debt is paid, or affect the same securities to the payment of the new debt. This is firmly established by the Common law jurisprudence in the United States and by the Civil law jurisprudence of the State of Louisiana. In such case the pledgee has no lien or right of retention originally created by the pledge, left to him, and his further detention of the security is unwarranted and unlawful. At the same time, as it is a matter of contract between the parties, they may agree that the securities in the hands of the pledgee will be a continuous pledge; that they will secure any balance of account due by the pledgeor; that they will secure future indebtedness of the latter. In all such stipulations there may not be any disturbance, or removal and replace-

ment of the pledge in the hands of the pledgee. The agreement suffices. *

295. Again, the parties may have contracted under the dominion of certain legislation or certain custom, by which the pledge is made to secure other debts than the particular one for which the pledge was first given, such as the case of a balance of account due a banker. In all such instances, the consent of the pledgeor to the extension of the pledge is either expressed or presumed. The statute in that case is read into the contract, or the custom implied into the agreement between the pledgeor and pledgee. The intention of the contracting parties is then, in case of contestation, either proved or presumed.

Such principles are common to contracts in general. †

296. The retention of the pledge after payment of the original debt, for the purpose of securing a subsequent debt, without the consent, expressed or implied, of the pledgeor, would be so clearly a gross violation

* Union National Bank vs. Slocomb, 34 La. An. 927.

Billet vs. Woods, 24 La. An. 193.

Marcadé, Explication of Code Napoleon, Vol. 4. No. 778.

† County vs. Huchburger, 46 Ill. App. 518.

Searight vs. Bank, Pa. Sup., 29 An. 783.

Bank vs. Harris, 26 Md. An. 523.

Bank vs. Hanson, 51 Neb. N. W. 1035.

Hardie vs. Wright, 18 Tex. S. W. 615.

Jarvis vs. Rogers, 15 Mass. 389.

Schiffer vs. Feagin, 51 Ala. 335.

Woolley vs. Banking Co., 81 Ky. 527.

Loyd vs. Bank, 86 Va. 690.

Bank vs. Loeb, 27 La. An. 110.

Burnap vs. Bank, 96 N. Y. 125.

Adams vs. Sturges, 55 Ill. 468.

Laloire vs. Wiltz, 31 La. An. 436.

Bank vs. Wiltz, 31 La. An. 244.

Jones, on Pledges, Sec. 354 *et seq.*

of the rights of the latter that it would give rise to a claim for damages against the pledgee.*

297. In France and in the other countries of continental Europe which followed its legislation after the promulgation of the Code Napoleon, the rule is different, and the security in the hands of the pledgee will secure a subsequent debt of the pledgeor, under certain circumstances, without any agreement or understanding to that effect. The agreement or understanding, on the contrary, would be necessary to prevent it from being so. The article of the Code Napoleon which provides for this continuing effect of the pledge in favor of the pledgee makes it a condition of it that the second debt should be contracted posteriorly, and be due anteriorly, to the first debt. The Code Napoleon states that if there existed from the same debtor in favor of the same creditor, another debt contracted subsequently to the pledge and exigible before the payment of the first debt, the creditor would not be obliged to surrender the pledge before being fully paid *the amount of both debts*, even if there had been no stipulation to affect the pledge to the payment of the second debt.† But the subtle reasoning of the Civilians has raised a very nice and curious question on this point. The Code Napoleon, as we see, provides that if it exists from the same debtor to the same creditor another debt *contracted after the pledge and exigible*

* Bank vs. Loeb, 27 La. An. 110.

Romero & Bayard vs. Newman, 50 La. An. 80.

Jarvis vs. Rogers, 15 Mass. 389.

Baldwin vs. Bradley, 69 Ill. 32.

Jones, on Pledges, Sec. 356.

Sénécal vs. Bauzé, House of Lords, Appeal cases, 1888-89, p. 637.

† Code Napoleon, Art. 2082.

before the first debt, the creditor shall not be obliged to part with the security before being fully paid both debts. Does this mean that the pledgee has against the other creditors both the lien and the right of retention, or either of them only, or neither of them at all? Laurent is of the opinion that the article gives the pledgee no lien or right of preference for the second debt, and he denounces the opposite doctrine as destructive of the principles of the Code. Mourlon, a more recent commentator, on the contrary, supports the theory that the pledgee has, by virtue of the article, the same lien for the second debt that he has for the first. But Troplong is of the opinion that the right of retention to secure the second debt can not affect the other creditors of the pledgeor.*

298. This feature of the French and modern Civil law is taken from the Roman law, as established by an edict of Emperor Gordian. But the Roman law went even farther than the French law, which in that respect did not follow its guide to the end. The edict of Gordian granted the right of retention to the pledgee without regard to the origin of the second debt, and whether it was contracted after or before the pledge. The reason given for such a rule is that the pledgeor, still owing the second debt, could not, without bad faith, demand the return of the pledge. *Propter exceptionem doli mali*, says Gordian. Cujas,

* Laurent, Droit Civil, Vol. 28, Sec. 508.
Mourlon, Examen Critique, No. 227.
Troplong, Nantissement, Sec. 461.
Code Napoleon, Art. 2082.

the great oracle of French jurisprudence of the sixteenth century, adopted this doctrine and joined in words of severe condemnation of the pledgeor who would have his property returned to him under such circumstances.*

The reason of the French law is given in the report of the discussions of the framers of the Code Napoleon. That reason is principally based upon the *presumption* that the pledgee consented to the second debt on condition that it would be secured by the pledge, and that the pledgeor agreed to it. This is why a debt of the pledgeor contracted *before* the pledge does not enter into the provision of the law. And again, the second debt must be *exigible* before the payment of the first, because the parties are also presumed to have contracted in view of the return of the pledge on payment of the debt first contracted. The law is, therefore, based upon the presumed consent of both parties that the pledge should secure the second debt; which is the fundamental principle governing all contracts. So much so, that the parties may, by agreement, provide differently, and stipulate that the second debt shall not be secured by the pledge. In default of such stipulation, they contract under the dominium of the article of the Code, which, in case of their silence, is read into the contract.†

* Code of Justinian, Vol. 3, Title XXVII.

Troplong, Nantissement, Sec. 462.

Id., Des Hypothèques, Vol. 1, Sec. 256.

Grenier, Des Hypothèques, Vol. 1, Secs. 298, 314.

† Laurent, Droit Civil, Secs. 504, 505.

CHAPTER XXIV.

THE PLEDGEE CAN NOT, EVEN BY PREVIOUS AGREEMENT, APPROPRIATE THE PLEDGE TO HIMSELF.

299. It is a fundamental principle of the Civil law, well established in the old Roman jurisprudence and introduced in the modern legislation of Continental Europe, that no agreement between pledgeor and pledgee, by which the latter would, for non-payment of the debt, become the owner of the thing pledged, is valid and enforceable in law. The forbidding provision is found in Art. 2078 of the Code Napoleon, and in Art. 3165 of the Civil Code of Louisiana.

The clause in question, which the French law writers speak of as the *pacte comissoire* of the Romans, is commented upon by them with great severity. Troplong says of it: "This pact is marked by excessive harshness. Almost ever the thing given in pledge is of superior value to the debt, and it is only in yielding to the moral constraint of necessity that the debtor consents to submit to the rigorous obligation of abandoning to the creditor that thing which is worth more than he owes. Such a clause is immoral: *contra bonos mores*. It is oppressive; it is the abuse of the strong party over the weak one; it is an odious speculation by the person who has money over the one who needs it." *

* Troplong, Nantissement, Sec. 379.

300. It was known in the Roman law as the *lex commissoria*. That was the pact or clause inserted in the contract of pledge, by virtue of which the thing pledged, in case of non-payment by the debtor, became the property of the pledgee. Constantine prohibited it when he contrived with great solicitude to improve the morals of his people, considering this stipulation in the pledge as *contra bonos mores*, because it facilitated usury and placed the borrower at the mercy of the creditor. This prohibition has been introduced generally into the countries of modern Civil law. The Code Napoleon provides for it in these terms: "The creditor can not, in default of payment, dispose of the pledge; reserving to him to have it ordered by the Court that the thing will remain with him in payment and up to the amount of the debt, by an appraisalment made by experts; or that it will be sold at public auction.

"Any clause which would authorize the creditor to appropriate the pledge to himself, or to dispose of it without the aforesaid formalities, is null."

The countries of Continental Europe have adopted the same rule of prohibition.*

301. As to the State of Louisiana, it may now be doubtful whether the clause in question is still forbidden by its statute. The prohibitive article of its

* Code Napoleon, Art. 2078.

Pothier, Nantissement, Sec. 18.

Troplong, Nantissement, Sec. 377 *et seq.*

De St. Joseph, Concordance des Codes Civiles, p. 109, showing uniformity of the law of Continental Europe on this point.

Merlin. Repertoire, *verbo Gage*.

Civil Code, enacted in the year 1870, is in the same words as that of the Napoleon Code from which it was taken. The last paragraph of the article reads thus: "Any clause which should authorize the creditor to appropriate the pledge to himself, or dispose thereof without the aforesaid formalities, shall be null."

But, in 1872, a law was passed, amending the article in these terms: "But in all pledges of movable property, or rights, or credits, stocks, bonds, or other movable property, it shall be lawful for the pledger to authorize the sale or other disposition of the property pledged, in such manner as may be agreed upon by the parties, without the intervention of the courts of justice; *provided*, that all existing pledges shall remain in force and be subject to the provisions of this act."*

Under the provisions of this law, it is the common practice now in Louisiana, to stipulate in all acts of pledge that the pledgee shall have the right, in case of non-payment, to sell the pledge at public or private sale, with or without notice, to buy it in, and so forth. The validity of such stipulations has never been doubted. But could the pledgee, by virtue of the law which makes it lawful for the pledgor to authorize the sale *or other disposition* of the thing pledged, stipulate that it shall become his property without sale and without appraisalment, though its value may be greater than the amount of the debt,

* Civil Code of Louisiana, Art. 3165.

Acts of the Legislature of Louisiana of 1872, p. 36.

as is ordinarily the case? This question has yet to be answered. It is likely to be answered in the negative. The prohibition contained in the article of the Civil Code of Louisiana is one of public order, as we have seen. The Act of 1872 can not be presumed to have been leveled at it, in providing that it shall be lawful for the pledgeor to authorize the sale *or other disposition* of the property pledged in such manner as may be agreed upon by the parties without the intervention of courts of justice. Such an indirect and implied re-establishment of the obnoxious pact or *lex commissoria* would be against all the rules of legislation.

302. The Common law has adopted from the Civil law the wise and humane principles of the edict of Constantine prohibiting the *lex commissoria*, the stipulation in the contract of pledge by which, in default of payment, the thing pledged shall become *ipso facto* the property of the pledgee, and that the pledgeor shall not have the right to redeem.

In this respect, the two systems seem to be on a par. Judge Story says: "If a clause is inserted in the original contract providing that, if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, it will be of no avail. For the Common law deems such a stipulation unconscionable and void upon the ground of public policy, as tending to the oppression of debtors."*

* Story, on Bailments, Sec. 345.

Chancellor Kent expresses the same views and says : “Every agreement preventing the right of redemption in mortgage of chattels, as of lands, would no doubt be equally condemned in the English law.” He says so in speaking of the contract of pledge and of the abolishment of the *lex commissoria* by Constantine.*

Mr. Jones is more positive in his opinion on the subject, and expresses it authoritatively in these words: “A right of redemption attaches to every pledge. This right is a part of the contract, whether it be express or implied, and the parties can make no valid agreement that there shall be no redemption after default. ‘Once a mortgage always a mortgage,’ is one of the most important maxims in the law of mortgages. With a change of terms it is equally applicable in the law of pledges. ‘The right of redemption attaches equally to both, and it is as difficult to transmute the one as the other into a sale by the operation of the original contract. Though anciently at Rome the creditor and debtor were permitted by the *lex commissoria* to make an agreement at the date of the pledge whereby it would, on a prescribed contingency, become the absolute property of the pawnee; such a power was not indulged, even at Rome, since the days of Constantine, who abolished the law by which it had been sanctioned. Every agreement for preventing redemption of pawns is proscribed by the Common law as emphatically as are similar agreements in mortgages of real estate.’

* Kent, Comm., Vol. 2, Sec. 583.

Therefore, if in a written or verbal contract of pledge it is stipulated that the property shall be absolutely the property of the pledgee if the debt be not paid at a time stipulated, the right to redeem exists notwithstanding the agreement of the parties. The law recognizes no agreement to prevent a redemption of the pledge. Any contract which is a pledge in the beginning continues a pledge until the debt is paid, or the right of redemption is foreclosed.*

303. It is to be observed, however, that both by the Civil and the Common law, the pledgeor can validly agree *after the debt has become due*, that the pledgee may keep the property as his own in payment of the debt. The transfer of property in such cases takes place by virtue of an agreement subsequent to and independent of the original contract of pledge. The debtor is then no longer under the pressure of necessity and constrained to submit to the exacting conditions of the creditor in applying for a loan of money. He is acting freely and presumed to be making no sacrifice of his property.†

304. The doctrine established by the abolishment of the *lex commissoria* of the Roman law, and by the prohibition of the modern Civil law of any agreement in the contract of pledge by which, in default of payment, the pledge would become the property of the pledgee, has been declared to be part of the Com-

* Jones, on Pledges, Sec. 553.

† Troplong, Nantissement, Sec. 403.

Laurent, Vol. 28, Sec. 520.

Story, Bailments, Sec. 345.

Jones, on Pledges, Sec. 555.

mon law, in the same manner, on the same principles and for the same reasons. The Supreme Court of the United States has said on this subject: "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right can not be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed."

305. The Court in the same case recognized also the corollary of the rule, which is that the debtor may, by a subsequent transaction, under certain circumstances and for a proper consideration, transfer the property to the creditor in payment of the debt. The Court said on this point:

"A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is

this necessary, as was said on one occasion by this Court, when the creditor had shown himself ready and skilful to take advantage of the necessities of the borrower (*Russell vs. Southard, supra*). Without citing the authorities, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding." *

This doctrine is carried so far that the subsequent release by the mortgagor of his equity of redemption is always looked upon with suspicion by the courts. †

* *Peugh vs. Davis*, 96 U. S. 337.

Russell vs. Southard, 12 How. 139.

† *Pritchard vs. Elton*, 38 Conn. 434.

Jones, on Mortgages, Vol. 1, Sec. 7.

CHAPTER XXV.

RIGHT OF THE PLEDGEE TO CAUSE THE PLEDGE TO BE SOLD, OR TO SELL IT HIMSELF.

306. The ultimate object and purpose of the contract of pledge are that, in default of payment by the pledgeor, the thing pledged should be sold to pay the creditor. The sale is necessary because, by default of payment or redemption, the pledge does not become the property of the pledgee. He has only a lien on it. There must be a foreclosure of the pledge to pass the ownership of the thing, either to the pledgee himself or to any other purchaser.

When and where legislation does not prescribe the mode of sale, the parties may, by their agreement, fix the manner, terms and conditions of the sale.

In France and in the Civil law countries of Continental Europe, which have followed the legislation of the Napoleon Code, the foreclosure of the pledge must be by judicial sale, and it must be preceded by a judgment in favor of the pledgee. But the pledgee is not compelled, in proceeding against the pledgeor, to demand the sale; he may choose to demand that the pledge should become his property by decree of Court, on an appraisal made by experts appointed by the judge, the surplus value, if any, in that case to be paid by the pledgee to the pledgeor.*

* Napoleon Code, Art. 2678.

Troplong, Nantissement, Sec. 400.

Such is the law of those countries for the pledge securing ordinary obligations, outside of commercial transactions. But for the sale or foreclosure of commercial pledges it is not necessary for the pledgee to proceed by suit and judgment against the pledgeor. The codes of commerce of those countries provide for a speedy sale of the securities without judicial proceeding. This will be the subject of a subsequent chapter.

307. In the State of Louisiana the parties may agree in the act or deed of pledge that the creditor on default of payment shall have the right to sell the pledge, or cause it to be sold, at private or public sale, with or without notice to the pledgeor; that the pledgee may be, for that purpose and to that effect, appointed by the pledgeor his agent to sell, and that the pledgee may himself buy the pledge for his own account. The greatest latitude is given to the right of the parties to fix their own terms of the agreement. In that case, as we said before, the power of attorney given the pledgee, being coupled with an interest, is not revocable. It is that of the *procurator in rem suam*.*

308. Mr. Jones, in his book on Pledges, has committed a great mistake in saying that, in Louisiana, the pledgee is compelled to obtain judgment against the pledgeor before selling the pledge, and that then it must be sold as in cases and with the formalities of judicial sales.†

* Renshaw vs. Creditors, 40 La. An. 37.

† Jones, on Pledges, Sec. 621.

Such was the law in that State by the Civil Code of the year 1870, cited by that distinguished writer. And this shows the danger of stating in treatises the statutory law of a State without verification of the latest amendments. The book of Mr. Jones was published in 1883. The article of the Louisiana Civil Code 1870, cited by him, was amended in 1872 by an act of the Legislature making it "lawful for the pledgeor to authorize the sale or other disposition of the property pledged, in such manner as may be agreed upon by the parties without the intervention of courts of justice." * It is the common practice now in Louisiana for the pledgee to sell the pledge, under the provisions of the law of 1872, without having recourse to the courts and without getting a judgment against the pledgeor. †

309. Mr. Edwards, in the third edition of his treatise on Bailments, published in 1893, commits the same error and states that, in Louisiana, "the pawnee can not, on failure of payment, dispose of the pledge; but must apply to a judge to order that the thing shall remain to him in payment for as much as it shall be valued at by two appraisers, or that it shall be sold at public auction, at the choice of the debtor; and every agreement authorizing the creditor to appropriate the pledge to himself, or to dispose of it without such formalities, is void. In the other States, where the Common law prevails, the pawnee is allowed to sell at his discretion, being held responsible, at his peril,

* Acts of Legislature of Louisiana of 1872, p. 36.

† Union Bank vs. Forsyth, So. Rep., Vol. 23, p. 917.

to deal fairly and justly with the pledge. The difference between the Civil and the Common law in this respect is modal; it barely touches the essential rights of the parties under the contract. The Civil law assumes the direction of the proceeding, working a foreclosure; and the Common law gives a remedy for any violation of its principles, in a like proceeding.*

Mr. Edwards, in this statement of the law of Louisiana, is guilty of a double mistake. First, he cites, and we might say quotes, an article of the Civil Code of that State, promulgated in the year 1825, and which was superseded by the Revised Civil Code of 1870. In the law of 1870, the pledgee could not demand that the thing pledged should remain to him in payment for as much as it should be valued at by two appraisers; but was limited to the right of demanding that the thing be sold at public auction. The law of 1870 itself was amended, as we have just shown, by a statute of 1872, which puts the law of Louisiana on this point upon the same level as the statutory law of most of the States of the Union, to-wit: That the parties in the contract of pledge may stipulate that the thing pledged may, on default of payment, be sold or disposed of in any manner and on any terms chosen by themselves. It is true that the Civil law prevails in Louisiana in what concerns persons, things, successions, donations, conventions, obligations or contracts, privileges, mortgages and prescriptions. But

* Edwards, on Bailments, Sec. 280.

its Commercial law is substantially the same as the Common law of England, as adopted in this country, and is mostly unwritten and established by custom. And in its law of pledge, in particular, at the same time that it has retained the most important and conservative provisions of the Civil law, it has set aside all such restrictions as could impede the course and progress of commercial transactions.

Such unguarded statements of the statutory law of a State as are made by both Mr. Jones and Mr. Edwards necessarily lead their readers into fatal errors, and are a blemish upon their works, the more to be regretted that these writers have displayed in their books considerable learning and taken very great pains in the discussion and exposition of their subject.

310. At Common law, and in the absence of an agreement of the parties for a private sale, where such an agreement is permissible, the modern rule is that, on default of payment, the pledgee has the right to cause the pledge to be sold at public auction, without judicial process or decree, after giving the pledgor proper and reasonable notice of the intended sale. This right of the pledgee to sell is inherent in him, as the same right to foreclose the mortgage is inherent in the mortgagee. The law will presume that such was the understanding of the parties at the time of the formation of the contract of pledge, in default of an express agreement.*

* Am. and Eng. Ency. of Law, Vol. 18, p. 668.
Jerome vs. McCarter. 94 U. S. 734.

CHAPTER XXVI.

RIGHT OF THE PLEDGEE TO BUY THE PLEDGE AT PUBLIC OR PRIVATE SALE.

311. The pledgee may be the purchaser of the thing pledged, either at public or private sale. If the sale is made by order of Court, at public auction, by foreclosure of the pledge, the pledgee has the same right to bid and buy in the pledge as the mortgagee, in the same circumstances, has the right to bid and buy in the mortgaged property. In such judicial sales the Court is the vendor. If the pledge is sold at private sale the pledgeor is the vendor. In that case, for the purpose of effecting the sale, he may employ an agent, and he may, in the act of pledge, appoint the pledgee himself his agent to sell on default of payment. Such is now the custom in the United States in commercial transactions of pledge; the pledgeor constitutes and appoints the pledgee his agent for the purpose of selling the pledge if the debt is not paid at maturity; and, in many acts or deeds of pledge, it is specially provided that the pledgee shall have the right to buy the securities himself, at the market rate, even at private sale. In that case we have the anomalous fact of one person acting in the double capacity of vendor and vendee. There is, therefore, in the transaction apparently no union of two minds, no *aggregatio mentium*, necessary to form a contract. But the sale and purchase in that case are only the

execution of the contract of pledge, in which the minds of the contracting parties have met before. The subsequent fact of the sale has been anticipated in that contract and the terms and conditions of the sale have been agreed upon and fixed in advance. The contract of pledge then is, at the same time, a contract of conditional sale.

312. When the pledgee is the agent of the pledgeor to sell, he comes clearly under the rule that the agent appointed to sell can not purchase the property of his principal, without the latter's consent. To enable the pledgee, therefore, to become himself the purchaser of the securities, at public or private sale, it is necessary that the pledgeor should have consented to it. When the pledgee has, in the act of pledge, stipulated for the right to buy the pledge, even if it is sold by himself, there is no question that such agreement is valid and binding upon the pledgeor.*

313. When the sale is made through an agent of the pledgeor, appointed in the act of pledge as the agent of both parties, the objection may be raised that the same person can not be the agent of parties having a conflicting interest. The biblical precept may be quoted in that case, that no one should serve two masters at the same time. Under that rule it has been held that the vendor and the purchaser can

* Mechem, on Agency, Secs. 461, 466.
Wharton, Agency, Secs. 232, 235.
Marsh vs. Whitmore, 21 Wall. 178.
Bain vs. Brown, 56 N. Y. 285.
Tewsbury vs. Spruance, 75 Ill. 187.
Am. and Eng. Ency. of Law, Vol. 1, pp. 375-6.

not be represented by the same agent, nor the insurer and the insured, nor the co-heirs in a partition suit or licitation.

But the objection to the same agent for two principals having conflicting interests only exists when they do not know that they have the same agent. If they appoint the agent jointly, knowingly and for purposes of their own, neither of them can afterward complain of the joint or double agency, nor of the acts of the common agent legally done.*

* Mechem, Agency, Sec. 67.

Rice vs. Wood, 113 Mass. 133.

Fitzsimmons vs. Exp. Co., 40 Ga. 330.

Joslin vs. Cowee, 56 N. Y. 626.

Robinson vs. Jarvis, 25 Mo. App. 421.

CHAPTER XXVII.

COMMERCIAL PLEDGES.

314. Properly speaking there is no specific commercial pledge either in the Civil or in the Common law. The Common law makes no distinction between the pledge of commercial effects and that of any other kind of property, or between the pledge securing a commercial transaction and the pledge securing a non-commercial transaction ; and the commercial pledge is no part of the Civil law. But, in some countries of the Civil law there are statutes providing for the special government of commercial pledges, as contradistinguished from other and ordinary pledges.

The general rule is that in the pledge, as well as in the discount or purchase of negotiable paper, the law merchant prevails in countries of either the Common or the Civil law. Both systems yield to it in that respect. The necessities of commerce, which are the necessities of the world, demand it. The importance of commerce is such at the present time in the civilized world, and it is so necessary that the commercial relations of the different countries should be governed by the same rules, that the law merchant may be considered as part of the law of nations.

315. In France and in Louisiana the commercial law governs the pledge of negotiable and quasi-negotiable paper by virtue of special statutes. The Code Napoleon, after establishing very precisely the rules

which govern the contract of pledge, enacts that “the above provisions are not applicable either to commercial matters or to licensed pawnbrokers, establishments, in regard to which the laws and regulations relative to them should be observed.”*

316. In Louisiana, a statute, now incorporated in the Civil Code, provides that: “When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditor the notes, bills of exchange, certificates of stock or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgeors thereof, if made in good faith.

“All pledges of movable property may be made by private writing, accompanied by actual delivery; and the delivery of property on deposit in a warehouse shall pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledgeors thereof, if made in good faith.

“If a credit not negotiable be given in pledge, notice of the same must be given to the debtor.”†

317. The requirement of the Civil law that an act of pledge in writing, stating the amount of the debt and describing the thing pledged, should be passed

* Code Napoleon, Art. 2084.

† Civil Code of Louisiana, Art. 3158.

between the parties, is therefore not necessary for the pledge of negotiable paper or other commercial securities. Simple delivery and possession are sufficient, as in the Common law pledge. But it is well to observe that, as the pledgee can not sell or cause the pledge to be sold at private sale without the consent of the pledgeor, the written act of pledge is necessary, after all, even for commercial pledges, for the purpose of showing the consent of the pledgeor for the sale, the terms and conditions thereof, and so forth.

THE PLEDGEE OF NEGOTIABLE PAPER A HOLDER FOR VALUE

318. As partly under statutory law and partly by the Common law, it is the law merchant which governs the pledge of negotiable paper, it follows that in the pledge, as in the discount or purchase of such paper, the pledgee is in the position of a holder for value when the pledge consists in negotiable paper, unmatured and taken on pledge by the pledgee without notice of any equities and for a valuable consideration. The principle of the French law, that the possession of personal property is equivalent to title, because such property has no following, applies here to the contract of pledge as part of the law merchant. The true owner, therefore, has no claim against the pledgee as holder for value, even when the property has been misappropriated, or purloined by an unfaithful agent. *

* *Tucker vs. Savings Bank*, 58 N. H. 83.
Greenwell vs. Haydon, 78 Ky. 332.

319. This principle has become axiomatic in American jurisprudence, and the proposition that the pledgee of negotiable paper is a holder for value wherever, under the same circumstances, a purchaser would be, is too clear to admit of doubt or discussion, both upon principle and upon authority. The reason is that, if the essence of the valuable consideration consists in parting with money, property or other valuable thing, it can make no difference upon the question of consideration, whether the paper sought to be enforced is to be deemed the principal or only the collateral security. The holder parts with his money or property upon the faith of both, and not upon the faith of one of them. If he is a holder for value of the principal obligation, so he is of collateral security; the two, in regard to the element of consideration, are inseparable.*

And even in case of a factor pledging without authority and feloniously the negotiable paper of his principal, to secure his own debt, the law merchant now prevails, and protects the honest pledgee against the true owner. For a while, under the strong pressure of the Common law principle that the factor can not pledge, though he can sell the property of his principal, the law merchant was checked in that respect, even in regard to negotiable paper, and the pledgee of such paper was sacrificed to the true owner. But this doctrine had ultimately to yield to the interest

* *Bank of New York vs. Vanderhorst*, 32 N. Y. 557.

of trade and finance, and the contrary rule, as stated above, was established.*

320. However well established the principle is with us that the pledgee of negotiable paper is a holder for value wherever the purchaser would be so under the same circumstances, the rule has in a recent case been again the subject of the full consideration of the House of Lords. A broker in London pledged to a bank, to secure loans of money for his own account, certain bonds belonging to his principal. The pledge was without authority from the owner of the bonds. These were negotiable instruments. The question was whether the bank as pledgee had a good title against the true owner and could be considered a holder in good faith, not having made inquiries under the circumstances, as to the power of the broker to pledge the bonds.

Lord Herschell said: "The question, then, which presents itself is, whether the appellants (the bank), who are in possession of negotiable instruments which were delivered to them, I will assume, in fraud of the plaintiff, the true owner, can make good their title to them? That they became holders for value is not disputed; nor is it disputed that they took with full honesty of purpose. The allegation in the statement of claims is as follows: 'The bank knew, and had notice, not only from the general course of business hereinbefore referred to, but from the particular transactions between them and the plaintiff's brokers,

* Kent's Comm., Vol. 2, p. 627.
Story, on Bailments, Sec. 326.

that the securities deposited with them by the plaintiff's brokers were the securities of the customers of such brokers, and in the belief that the brokers who brought them had made sufficient advances on them to justify them in obtaining the amounts which they from time to time obtained from the bank, and relying on the integrity of the brokers the defendant's bank from time to time made and continued advances to the brokers on such securities as the brokers from time to time deposited with them.' Applying this allegation to the transaction under consideration, it would be impossible to conceive a more unequivocal admission that the appellants acted in complete good faith in taking the bonds in question. But the statement of claim goes on to allege that the bank 'made no specific inquiries as to the ownership of the said securities, or the authority (if any) which the brokers had to deposit the same, or the interest (if any) which the brokers had therein by reason of advances on such securities or otherwise.' It is upon this allegation that the bank had notice that Delmar held these bonds in the capacity of an agent that reliance is placed. I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming for the moment that this was proved, what is its effect? It is contended on behalf of the respondent, as I understand, that it put the bank upon inquiring as to the title of the person with whom they dealt,

and as to the authority which he possessed ; and that having made no such inquiry, they obtained as against his principal no better title than he had. It was admitted that any one buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the position that in regard to a pledge the case is different, that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but can not so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority. The Factors Act (6 Geo. 4, c. 94), which gives validity to sales and pledges by persons entrusted with the documents of title to goods, contained a proviso ‘ that the purchaser or pledgee had not notice by the documents or otherwise, that the seller or pledgeor was not the actual and *bona fide* owner of the goods sold or pledged—a proviso which, especially after the decision in *Fletcher vs. Heath*, rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only ’ (per Blackburn J. in *Cole vs. Northwestern Bank*). Accordingly the Legislature intervened and altered the law by

the 5 and 6 Vict., c. 39. The recital is noteworthy, that 'advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto.' Under this act a document of title to goods may safely be taken by way of pledge from one known to be an agent without inquiry as to his authority. It would be strange, indeed, if a negotiable instrument might not as safely be taken. Advances on the security of negotiable instruments are as usual and ordinary a course of business as advances on the security of goods and merchandise, and it is surely just as 'expedient and necessary that reasonable and safe facilities should be afforded thereto.' It was truly said that it was due to the act of the Legislature that documents of title to goods may safely be taken by way of pledge from an agent, and that there had been no such legislation in relation to negotiable instruments. But why not? The answer, to my mind, is plain—because it never was supposed to be necessary in order to give validity to such a transaction in the case of negotiable instruments. It is admitted that, in the case of a sale, legislation was not requisite; that the fact that the instruments were negotiable sufficed; why not, then, in the case of pledge? If the contention of the respondent is to prevail, a negotiable instrument will be less negotiable than a bill of lading or a dock warrant—a strange conclusion, surely. The truth is, in my opinion, that

what the Factors Acts have done is to attach some of the elements of negotiability to documents of title to goods, render the mere possession of them evidence of authority to deal with them in the ordinary course of business, and to preclude the necessity of any further inquiry.”*

321. But it follows also from the rule that the pledge of negotiable paper is entirely governed by the law merchant—that, like the discount and purchase of the same, the pledge is subject to the same diversity of opinion as to what constitutes the pledgee a holder for value in certain cases. For instance, a valuable consideration for a pledge may or may not be a pre-existing debt of the pledgor, according as we follow the jurisprudence of the State of New York or that of other States of the Union, or that of the courts of the United States. Therefore, the true owner of a bill of exchange might recover it, as his property, in New York, against a pledgee in good faith, whose debt, secured by the pledge of the bill, was a pre-existing one of the pledgor. The pledgee there would not be a holder for value. But, under the same circumstances, the pledgee in Louisiana, or some other State of the Union, would be a holder for value, because there, a pre-existing debt is a sufficient consideration for negotiable paper, and brings it under the rule of the law merchant. We must observe that

* *London Joint Stock Bank vs. Simmons*, Law Reports Appeal Cases 1892, p. 216.

Earl of Sheffield vs. London Joint Stock Bank. 13 Appeal Cases. 333.

it is not in the law of pledge that the difference lies, but in the law merchant.

The same equities would exist, or not, in favor of the drawer, or maker, of the negotiable paper, according to the same rule of the law merchant in some States.*

322. The converse of the rule is equally true, to-wit: that, as the law merchant governs the contract of pledge, negotiable paper which is past due and, therefore, is subject to the equities of third persons, is subject in the hands of the pledgee to the rights of the true owner when it has been pledged without his consent. The rule is precisely the same whether the negotiable paper, which has lost its character of negotiability, has been purchased by the third holder or received by him on pledge. And the rule is not in any manner affected by the fact that the negotiable paper consists in bonds or interest coupons of the States or of the United States.†

323. The Court of New York has stated the principle clearly when it said that the rights of a trans-

* *Coddington vs. Bay*, 20 Johns, 637.

Swift vs. Tyson, 16 Peters, 1.

Givanovich vs. Citizens Bank, 26 La. An. 15.

Comstock vs. Hier, 73 N. Y. 269.

Oates vs. National Bank, 100 U. S. 239.

Railroad Company vs. National Bank, 102 U. S. 14.

Goodwin vs. Loan Company, 152 Mass. 199.

See *Jones, on Pledges*, Sec. 89 *et seq.*, where the subject is considered at length.

† *Stern vs. Bank*, 34 La. An. 1119.

Bird vs. Cochran, 28 La. An. 70.

Parsons vs. Jackson, 99 U. S. 434.

Vermilye vs. Adams, 21 Wall. 143.

Texas vs. White, 7 Wall. 700.

Henderson vs. Case, 31 La. An. 215.

Cowdrey vs. Vandenberg, 101 U. S. 571.

feree, whether by purchase or pledge, were those of a *bona fide* holder for value of negotiable paper, when the transfer was made in the usual mode and in the ordinary course of business and without notice of any defects in the title. Those rights are protected by the law merchant against all latent equities, whether of third persons or of parties to the instrument. The title of such pledgee or transferee is perfect, and his right to enforce the obligation is absolute. But if any of the circumstances are wanting which go to make up a perfect title, a purchaser or pledgee of commercial paper takes it subject to the same rules which control in the case of a transfer, assignment or pledge of non-negotiable instruments.

In the case of a pledge of negotiable paper, even in the ordinary course of business, before maturity, and for value, delivery and possession of the thing pledged is as essential and indispensable as in the pledge of any other kind of property. And there is no such thing as a symbolical delivery of negotiable instruments. The law does not recognize, for commercial purposes, a right of possession as distinct from the actual possession. The evidence of ownership of negotiable bills is their possession, properly endorsed, so as to pass the title to the holder.*

324. From the fact that in the pledge of negotiable paper for a valuable consideration before maturity and in the usual course of business, the law merchant, and not the law of pledge, governs (or rather

* *Muller vs. Pondir*, 55 N. Y. 325.

because the law of pledge is in such cases merged into the law merchant), it follows that the pledgee of such paper can *validly*, if not *rightly*, subpledge, or transfer the pledge, to secure his own indebtedness. We say validly, because his transferee will have a good title against the true owner; but not rightly, because without the consent of the owner, the pledgee has no right to make use of the pledge for his own benefit, and therefore has no right to use it for the purpose of obtaining credit and securing his own creditor.*

* *Matthews vs. Rutherford*, 7 La. An. 225.
· *Building Association vs. Ferguson*, 29 La. An. 548.
Tucker vs. Savings Bank, 58 N. H. 83.
Bank of New York vs. Vanderhorst, 32 N. Y. 557.
Story, on Pledges, Sec. 322.

CHAPTER XXVIII.

COMMERCIAL PLEDGE UNDER THE LAW OF FRANCE AND OTHER COUNTRIES OF THE CIVIL LAW.

325. The French Code of Commerce, as modified and completed by a law of the year 1863, is probably the most perfect work of legislation which governs the Commercial Pledge. As far as human prevision can go, it clears up the uncertainties and supplies the deficiencies of the Common law on this subject and releases this important branch of the Commercial law from the obstructive formalities of the Civil law. In not more than three articles this instrument of legal wisdom establishes what the Commercial pledge is, between what persons it may take place, what can be the subject of it, under what form it may be made, what the rights of the contracting parties are. It fixes the difference between the Commercial pledge and the pledge of the Civil law. It facilitates, encourages and secures commercial transactions. The whole subject is provided for in the following words :

“Article 91. The pledge, constituted either by a trader or by a person who is not a trader, for a commercial transaction, is proved in reference to third persons, as well as to contracting parties, conformably to the provisions of Art. 109 of the Code of Commerce. The pledge in respect to negotiable effects may also be established by a regular endorsement indicating that these effects have been delivered as

security. In respect to shares of stock, shares of interest and of nominative obligations of financial, industrial, commercial or civil partnerships, the conveyance of which is made by a transfer on the books of the company, the pledge may equally be established by a transfer, by way of security, registered on the said records. The provisions of Art. 2075 of the Civil Code concerning movable credits, in the possession of which the assignee can only be put, in respect to third persons, by notice of the transfer given to the debtor, are not hereby affected. Commercial effects given in pledge may be collected and appropriated by the pledgee."

"Article 92. In all cases, the privilege of the pledgee subsists only when the pledge has been put and remained in his possession, or in that of a third person agreed upon by the parties. The creditor is considered as having the goods in his possession, when they are at his disposal in his stores or ships, at the custom-house or in public warehouse, or if, before they arrive, he has possession by means of a bill of lading."

"Article 93. In default of payment when the same is due, the creditor may, eight days after notice to the debtor or pledgeor, cause the things pledged to be sold at public sale. The sales, other than those of which the stockbrokers alone have charge, are made through commercial brokers. However, at the request of the parties, the president of the Court of Commerce may designate another class of public

officers to make the sale. In that case, the public officer, whoever he may be, who has charge of the sale, is subjected to the rules which govern the brokers in relation to the forms, tariffs and responsibilities. The provisions of Articles 2 and 7 inclusively of the law of the 28th of May, 1858, on public sales, are applicable to the sales provided for in the preceding paragraph. Any clause which would authorize the creditor to appropriate the pledge to himself, or to dispose of it without the formalities herein prescribed, is void."

326. In providing that the Commercial pledge is established, both in regard to third persons and to the parties themselves, according to the requirements of Art. 109 of the Code of Commerce, the French law relieves that contract of the necessity of the written act demanded by the Civil law, and permits the verbal pledge in commercial transactions. Article 109 reads thus: "The purchases and sales (of goods and commercial effects) are established: by public acts; by acts under private signature; by the memorandum of a stockbroker or a commercial broker, duly signed by the parties; by an invoice accepted; by the correspondence; by the books of the parties; by the verbal proof in cases where the Court will think proper to admit it."

327. Where it is not incompatible with these provisions of the Code of Commerce, the Commercial pledge is still governed by the rules established by the Code Napoleon. Thus, the parties to the contract so

far as their competency is concerned, must be such as designated by the Civil Code ; and the things which may be given in pledge are equally those which are there declared to be susceptible of being pledged.

By the French law, the Commercial pledge takes place as well between traders as between persons who are not traders on both sides, in this, that the creditor needs not be a trader ; but the debtor or pledgeor must be one, because the Commercial pledge must be given for *an act of commerce*, says the article, and such acts or transactions necessarily take place in the affairs of traders or commercial men.

Nor needs the thing given in pledge be a commercial effect. The debtor and pledgeor may validly pledge any property susceptible of being pledged in the Civil law, and such security shall be governed by the law of the Commercial pledge, provided the obligation to be thereby secured arises from a commercial transaction. But it is proper to observe that, when negotiable effects are pledged, it is necessary that the endorsement by which the transfer is made should state that they have been delivered *as security*.

328. There is the same essential necessity in the Civil law and the Commercial pledge that the pledgee should have possession of the thing pledged. That possession may, in both cases, be only symbolical or constructive. If a credit is pledged, notice of the pledge to the debtor of the credit is equally necessary in the Commercial pledge to constitute the possession of the pledgee.

Hence it follows that, when possession of a thing can not be delivered, as in the case of things *in futuro*, or of claims, or credits, or other rights to which there is no title attached, the pledge of such things can not be legally made.

In the Commercial pledge of shares of stock, if they are to bearer, the mere delivery of the certificate or title to the pledgee operates as a pledge. If the shares of stock are nominative, the pledge must be notified to the company and a transfer made on its books.*

And we see, also, by the article of the French Code of Commerce that the *pactum commissorium*, or the clause by which the pledgee would stipulate that the thing pledged should become his property in default of payment of the debt, is equally prohibited in the Commercial pledge.

329. The two great distinctive features of the French law of pledge are that the Commercial pledge needs not be evidenced by a written act, and that the creditor is not submitted to the necessity of bringing suit against the pledgor for the purpose of selling the pledge, but has the right to put it up for sale after a notice of eight days to the debtor.†

We see in this again the constant solicitude of the law, common to all countries, for the interests of com-

* Laurent, Nantissement, Sec. 441.

Troplong, Nantissement, Secs. 292, 286.

† French Code of Commerce, Arts. 91, 92, 93 and 109.

Goiraud, French Code of Commerce, p. 152 *et seq.*

Baudry-Lacantinerie, Nantissement, Sec. 147 *et seq.*

Troplong, Nantissement, Sec. 110 *et passim.*

Laurent, Nantissement, Sec. 490.

Pont, Nantissement, p. 670 *et seq.*

merce. Commercial transactions brook no delays or formalities which cause delay. Therefore none should be incurred in preparing written acts of pledge in the affairs of merchants. Nor should these be hindered by legal proceedings in the recovery of their claims and realization of their securities when they have immediate need of their capital. The French Code of Commerce and the Common law have joined hands in this matter.

330. The general march of modern and recent legislation in the countries of Civil law is toward the protection of the pledgee in commercial transactions, even to the prejudice of the true owner when his property has been disposed of without his consent by an unfaithful agent.

Thus the Code of Commerce of the German Empire provides: "When merchandise or other movables of a merchant are alienated and delivered in the course of his business, the purchaser in good faith acquires the ownership thereof, even when the seller was not the owner.

"The original ownership is extinguished. Any prior right of pledge or other real right, if unknown to the purchaser, is extinguished. If merchandise or other movables are pledged and delivered by a merchant in the course of his business, no prior ownership, pledge or other real right on such merchandise or movables can prevail to the detriment of the pledgee in good faith or his assignee.

"The statutory pledge of a commissioner, consignee

or carrier rests upon the same basis as the right of contractual pledge. This article has no application when the things were lost or stolen.”*

We find also in the Code of Commerce of the Netherlands that, if goods sold and unpaid for are claimed by the vendor when they have been pledged by the purchaser to a pledgee in good faith, the latter can not be compelled to surrender them without being paid the amount of his debt; and that such is the law, even when the goods have been pledged by a commissioner or a factor.†

And this is the constantly appearing contrast of the Common law and the Civil law in the disposition of personal property by an unfaithful agent; the Common law ever shielding the true owner against even an honest vendee or pledgee; the Civil law always protecting the honest vendee or pledgee against even the true owner.

* Code of Commerce of the German Empire, Art. 306.

† Code of Commerce of the Netherlands, Arts. 237 and 241.

CHAPTER XXIX.

PLEDGE OF BILLS OF LADING.

331. The bill of lading is every day in commercial affairs the subject of the contract of pledge. More properly speaking, and with a better understanding of the matter, it is not the bill of lading itself which is pledged, but the goods or merchandise for which it is a receipt given by the common carrier, and which it may be said that it represents. From the time that bills of lading were first used, in the early days of modern trade, usage, which is the basis of commercial law, established the rule that the holder of the bill, whether the original one or a subsequent transferee, was apparently the owner of the goods, and therefore entitled to the delivery and possession of them. Until he has delivered them the common carrier is the agent of the holder of the bill, whoever he may be, and his possession is that of the said holder. The pledgee has, therefore, possession of the goods through the common carrier, the moment the bill of lading is transferred to him, as the owner or shipper had before the transfer. The bill is not the *symbol* of the goods, as said by some writers, but more properly the *title* to them. The possession of the pledgee by means of the bill is not merely symbolical or fictitious, but corporeal, though vicarious, as the com-

mon carrier is holding the goods for him until delivery.*

It is not, therefore, because the bill of lading represents the goods that the transfer of it makes a valid pledge of them. It is because the transfer of the bill transfers also the possession of the goods to the pledgee, and thereby fulfils in that respect that essential condition of the contract of pledge.

The same thing may be said of the pledge of goods deposited in a warehouse or store. The delivery of the keys of a store to the pledgee constitutes the delivery and possession of the goods, not because the keys are symbolical of the goods, but because the pledgeor thereby loses his possession and control of them, and transfers thereby the same control and possession to the pledgee.†

It is only in the pledge of incorporeal things, such as credits or claims, that the delivery and possession are symbolical or fictitious, and made by the transfer of the title or evidence of the rights to the pledgee and by notice to the debtor of the claim.‡

332. If the transferee of the bill of lading was not, apparently at least, the owner of the goods and entitled to the delivery and possession of them, and if the pledgee could not be put in possession until actual and corporeal delivery, on arrival of the vessel,

* Jones, on Pledges, Sec. 227.

Troplong, Nantissement, Sec. 324

† Troplong, Nantissement, Sec. 324

Porter, on Bills of Lading, Sec. 496.

‡ Civil Code of Louisiana, Art. 3153.

it is evident that the pledge of the bill of lading itself would be no security to the creditor, and bills of lading would not play the all-important part that they now play in the immense commercial and financial affairs of the world. Nor would, in that case, the goods and merchandises themselves be the subject of the enormous commerce of the world.

We say that the pledgee of the bill of lading is *apparently* the owner of the goods, and so he is to the extent of the debt secured by the pledge. But we must not forget that the transfer of the bill to him is only the execution of a contract of security, and consequently that the absolute ownership of the bill or of the goods is not conveyed to him. The transfer is intended to *secure the payment* of the debt, not to *effect payment*. If the bill of lading were to be invalidated for some reason or other, or if the goods were destroyed by some accident, the security would be gone, but the debt would still subsist. If the transfer of the bill were intended to *effect payment*, it is evident that from that moment the transferee would become absolute owner of the goods, but the relation of debtor and creditor would cease between the pledgeor and the pledgee.

333. The writer of the opinion of the Court in the case of *Mearns vs. Bank of Randall*, 146 U. S. 627, expressed himself, therefore, erroneously when he said: "As to the four car loads named in the bill of lading, that instrument represented the cattle; and the transfer of the ownership, as well as of the right

of possession, was made as effectually by the transfer of the bill as it could have been by a physical delivery of the cattle." The case was one of a pledge to secure a loan of money. Had the security failed for one reason or the other, the lender would clearly have been a creditor still.

It is evident that the Court did not mean that the absolute ownership was conveyed to the pledgee in the sense which the word ownership has in law and under the definition which the Institutes of Justinian give of it: "*Jus utendi, fruendi et abutendi.*"

The next paragraph in the opinion expresses the real meaning of the Court: "When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser so far as the exercise of those rights was necessary to protect the holder."

The use of the word ownership in speaking of the transfer of a bill of lading to a pledgee is a deplorable confusion of terms in jurisprudence, especially where it is found in the decisions of the highest Court of the land.

334. The cases cited in the opinion in support of the principle that the pledgee, as transferee of a bill of lading, is a qualified owner of the same have not been more guarded or more correct in their language in this particular. In the case of *Dows et al. vs. National Exchange Bank*, 91 U. S. R. 632, the Court said: "When, therefore, the drafts against the wheat were discounted by that bank, and the bills of

lading were handed over with the drafts as security, the bank became the owner of the wheat and had a complete right to maintain it until payment. The ownership of McLaren & Co. was transmitted to it, and it succeeded to their power of disposition. That the bank never consented to part with its ownership thus acquired so long as the drafts it had discounted remain unpaid is rendered certain by the uncontradicted written evidence.”

We see in those cases, words placed in juxtaposition, which are incompatible together when applied at the same time to the same person, to-wit: *security* and *ownership*. A person can not have a lien or security on property of which he is the owner.

335. The term property used to designate the right of a pledgee, or of a mortgagee, over the personal property affected by his lien and transferred to him for the purpose of security only, has been that of *special* or *qualified property*. To pass from that to the words *owner* and *ownership* without qualification is a looseness of language which is prejudicial to the understanding of jurisprudence. The Civilians are more exact and more careful of their expressions in the discussion of legal subjects.

336. Though the pledgee of the bill of lading is not the absolute owner of the goods which it covers, he is fully entitled to the delivery and possession of them, and this is what makes the importance of it. The pledgee's right is, therefore, superior to that of the unpaid vendor of the goods. The latter could not

exercise against him the right of stoppage *in transitu*. And in the Civil law countries the vendor's privilege or lien for the unpaid price would yield to the higher lien of the pledge. And it is so whether the bill of lading is negotiable or not, as it is in some States and not in others. The rule is based upon the principle that the shipper or original holder of the bill of lading has parted with his right of possession of the goods and transferred the same to the pledgee by endorsing the bill to the latter.*

337. There has been a great diversity of opinion in France on the question whether, in case of a bill of lading, not to order, not to bearer, but to a designated person, the pledgee of the bill by simple endorsement from the latter was entitled to possession of the goods against an unpaid vendor; in other words, whether such endorsement would constitute a valid pledge without a transfer of the goods by a deed of pledge. The courts and the commentators of the Code Napo-

* Troplong, Nantissement, Sec. 327.

Jones, on Pledges, Sec. 266.

Porter, on Bills of Lading, Sec. 510 *et seq.*

Benjamin, on Sales, Sec. 864 and notes.

Dows vs. Bank, 91 U. S. 618.

Bank vs. Dearborn, 115 Mass. 219.

Holmes vs. Bank, 87 Penn. St. 525.

Emery vs. Bank, 25 Ohio, 360.

Bank vs. Meyer & Co., 43 La. An. 1.

Halsey vs. Warden, 25 Kansas, 128.

Bank vs. Homeyer, 45 Mo. 145.

Richardson vs. Bank, A. R., Vol. 31, p. 140.

Gumbel vs. Beer, 36 La. An. 491.

Delgado vs. Wilbur, 25 La. An. 84.

Colgate & Co. vs. Penn. Co., 102 N. Y. 120.

Bank vs. Logan, 74 N. Y. 568.

Bank vs. Kelly, 57 N. Y. 34.

Bank vs. Fiske, 71 N. Y. 353.

Sewell vs. Burdick *et als.*, House of Lords, Appeal Cases, 1884-85, p. 74.

leon are divided on the subject. The Court of Cassation held that such pledge by endorsement of a non-negotiable bill of lading was not valid. Troplong sides in the discussion with the Court of Cassation. He says very rightly: "When the bill of lading is to a designated person it does not belong to him to make it, of his own authority, negotiable by endorsement. The originator of the bill of lading not having made it negotiable *ab initio*, it is not allowed to the person specially named in the instrument to render it such by his sole will. It would be transforming the contract and changing its nature. In such case the endorsement creates simply a power of attorney and the holder of the bill of lading is subject to all equities. This is what the Court of Cassation has decided."*

Such a case is governed by the rules of the Civil Law, and not by those of the law merchant, from which the parties have departed by making an uncommercial bill of lading.

338. The Court of Louisiana has maintained the same principle in a recent case, though the decision is subject to criticism on other grounds. In that case the factor of a cotton planter pledged, to secure his personal debt, a bill of lading covering a number of bales of cotton of his principal. By the law of Louisiana, factors have no right to pledge the property of their principals for their own debts. The bill of lad-

* Troplong, Nantissement, Secs. 330 and 337.

Court of Cassation, 13 August, 1879, Journal du Palais, 1891.

† Troplong, Nantissement, Sec. 330.

Court of Cassation, 13 August, 1879, Journal du Palais, 1881.

ing was issued to the factor *eo nomine* as consignee of the cotton, but not to his order. The owner claimed the cotton against the pledgee, pleading the invalidity of the pledge. The pledgee contended that, under the statute of Louisiana, the bill of lading was negotiable in the same manner and to the same extent as a bill of exchange, and that he was therefore to be considered as a holder for value and in good faith.

The Court held that the bill of lading was not transferable by the consignee, nor the goods deliverable to his order; that his endorsement only operated as an assignment to the pledgee, subject to the higher rights of the owner.*

But the Court went on and passed upon the statute of Louisiana which assimilates bills of lading to bills of exchange in their negotiability, and construed the statute in a manner which seems to destroy it altogether. And this brings us to the consideration of the question full of importance and of actuality, to-wit: to what extent are bills of lading negotiable?

339. By the Commercial law, bills of lading are transferable by endorsement and delivery, and, thereby, either the special property or the full ownership of the goods they cover passes to the transferee according to circumstances. In that way and to that extent, bills of lading are negotiable, or they are, as commonly said, *quasi*-negotiable securities. But they are not negotiable to the extent of making the transferee a holder for value, as in the transfer of nego-

* *Lallande vs. Creditors*, 42 La. An. 711.

tiable paper, and of cutting off the equities of third persons. Such is the law of England and of the United States generally.*

340. Mr. Jones states the rule clearly in the following words: "The rights of a pledgee to a bill of lading by indorsement or delivery are the rights of the pledgee of the property itself by a delivery of it. A bill of lading, though negotiable in form, is not a negotiable instrument, like a bill of exchange, but a symbol or representative of the goods to which it relates; and the rights arising from a transfer of a bill of lading correspond, not to those arising from the transfer of a negotiable instrument, but to those arising from a delivery of the property under like circumstances."

And he illustrates the principle in a forcible manner: "One making advances upon a bill of lading to one who is not the owner of the property therein described, acquires no right of property therein. Although possession is *prima facie* evidence of ownership, yet that alone does not deprive the true owner of his title. Taking possession of the property, shipping it, obtaining bills of lading from the carriers, indorsing away the bills of lading, or even selling the property and obtaining a full price for it, can have no effect upon the rights of the owner. Even a *bona fide* purchaser obtains no right by a purchase from one who is not the owner, or not authorized to sell.

* Benjamin, on Sales, Sec. 864 and notes.
Pollard vs. Vinton, 105 U. S., p. 7.

Therefore, if an owner of cotton authorized another person to ship it, but gives the agent no authority to ship it in his own name, the latter, by shipping in his own name, and taking a bill of lading accordingly, can not, by negotiating this, charge the cotton with the payment of advances made on the faith of such bill of lading.*

341. The pledgee of a bill of lading, like the purchaser, has, therefore, the same right to the goods that he would have if they were actually and corporally transferred to him; but he has no more rights than the transferee in such a case against the true owner.†

We find consequently in the bill of lading what we find in numerous contracts affecting personal or movable property, the great difference between the Common law and the Civil law, to-wit: In the former, that no title can be conveyed to such property by a person who has no right to it; and, in the latter, that possession of such property is equivalent to title,

* Jones, on Pledges, Secs. 242, 244.

† Porter, on Bills of Lading, Secs. 510, 461.

Means vs. Bank, 146 U. S. 627.

Sewell vs. Burdick *et als.*, House of Lords, Appeal Cases, 1884-85, p. 74.

Richardson vs. Atlas National Bank (La.), A. R.

Bank vs. Meyer & Co., 43 La. An. 1.

Turner vs. Israel (Ark.) 41 S. W. 806.

Lewis vs. Springfield Banking Company (Ill.), 46 N. E. 743.

Ayres, Weatherwax & Reed Company vs. Dorsey Produce Company (Iowa), 70 N. W. 111.

Union Trust Company vs. Trumbull (Ill.), 27 N. E. 24.

Gill vs. Kymer, 5 Moore, 503.

Fielding vs. Kymer, 2 B and B. 639.

Newsom vs. Thornton, 6 East, 17; 2 Smith. 207.

Guichard vs. Morgan, 4 Moore, 36.

Martini vs. Coles, 1 M. and S. 140.

Colgate & Co. vs. Penn. Co., 120 N. Y. 120.

and, therefore, that the possessor may convey rights that he himself has not.

342. But in some of the States statutes have been passed changing the commercial law in that respect and extending more or less the negotiability of bills of lading.

We find in the excellent work entitled “American and English Encyclopedia of Law,” the following paragraph:

“TITLE OF PLEDGEE. *In General.* In England and in many of the States of the Union, by statute, bills of lading are made negotiable and placed on the same footing as bills of exchange. In such States there is no doubt that the pledgee, holding for value and in good faith in the usual course of business, gets an indefeasible title to the property represented by the bill of lading. But leaving out of view these statutory enactments, where the bill of lading is regarded strictly as the symbol of the goods, it naturally follows that the pledgee of the bill of lading has no more title in the goods than he would if the goods themselves were delivered: that is, he gets only the title that the assignee had.” *

343. Except in Maryland, it may be doubtful that any of the statutes alluded to above have rendered bills of lading negotiable to the extent of bills of exchange, and to the effect of rendering an assignee or pledgee a holder for value; and the Courts have

* Am. and Eng. Ency. of Law, Vol. 18, p. 629.

been very loath to declare bills of lading negotiable to the full extent.

344. As to England, the authors of the *Encyclopedia of Law* do not seem to be as accurate in their statement as they are generally. Mr. Benjamin, in his treaty on the sale of personal property, a high authority in English law, though originally a citizen and lawyer of Louisiana, says, in commenting upon bills of lading in England as affected by the Victoria statutes :

“The first point to be noticed is that a bill of lading is not negotiable in the same sense as a bill of exchange, and that therefore the mere honest *possession* of a bill of lading endorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. *The endorsement of a bill of lading gives no better right to the goods than the endorser himself had* (except in cases where an agent *entrusted with it* may transfer it to a *bona fide* holder under the factors’ act), so that if the owner should lose or have stolen from him a bill of lading endorsed in blank, the finder or the thief could confer no title upon an innocent third person.” *

In Louisiana the statute which renders bills of lading negotiable reads thus :

“SEC. 6. Any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company, may be transferred by endorsement therein,

* Benjamin, *Sale of Personal Property*, Sec. 864.
Potter, on *Bills of Lading*, Sec. 442.

and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour or other produce or commodity therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons.”

And Sec. 9 of the same law says that—

“All receipts, bills of lading, vouchers or other documents issued by any cotton press, wharfinger, forwarder or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by endorsement in blank, or by special endorsement, *in the same manner and to the same extent as bills of exchange and promissory notes now are.*”

The intention of the lawgiver in framing this statute seems clearly to assimilate, almost to identify, bills of lading to bills of exchange in their negotiability. The statute says *in the same manner and to the same extent* as bills of exchange. With such words of assimilation, what can differentiate them? An assignee or a pledgee in good faith of a bill of lading under the provisions of such a law ought to be considered a holder for value and be protected against the equities of third persons. Yet the Court of Louisiana has decided otherwise in the case which we have referred to above of *Lal-lande vs. His Creditors*. It rested its judgment partly upon the authority of the case of *Shaw vs. Railroad Company*, 101 U. S. 557. But the decision of

the Supreme Court of the United States rested upon a different statute, which made bills of lading negotiable *in the same manner* as bills of exchange and promissory notes, but not *to the same extent*, as does the Louisiana law. The Supreme Court of the United States in that case said, speaking of the effects of the negotiability of bills of exchange: "If these were intended surely the statute would have said something more than merely make them negotiable by endorsement. No statute is to be construed as making an innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange, not to be inferred from words that can be fully satisfied without it."

346. The words of the Louisiana, as those of the Maryland statute, clearly show the intention of the Legislature that the transferee in good faith of a bill of lading should be held a holder for value, free from equities, just as the holder of a bill of exchange. It is clearly intended for the greater protection and promotion of commerce. Such was the early law of some of the countries of continental Europe, when commerce first dawned out of the darkness of barbarism, and so has the law remained in those countries up to the present day. But of this later.

347. The Court, in the Louisiana case of *Lallande vs. His Creditors*, was evidently influenced in its judgment by the fact that the pledgeor of the bill of lading was a factor pledging his principal's property

to secure his own debt, in violation of the law of the State. But the real question was whether the bill of lading was, or not, negotiable paper. If it were, the quality of factor in the pledgeor disappeared in the case. If, instead of a bill of lading, the factor has pledged for his own debt and fraudulently a bill of exchange or a promissory note, belonging to his principal, and the pledgee had taken it in good faith, before maturity, for value and in the usual course of business, would not such pledgee have a good title against the true owner? Clearly so.* In a previous case, in which the bill of lading was not transferred by a factor, the Court recognized its negotiability under the same statute.†

348. The Court of Louisiana, in deciding the Lal-lande case and relying upon the judgment of the Supreme Court of the United States in Shaw vs. Railroad Company, says: "In the case of Shaw vs. Railroad Company, 101 U. S. 557, the Supreme Court considered the effect of an endorsement of a bill of lading which was made *under a similar act to that of 1868*, and they said: 'It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by endorsement and delivery, all the consequences of an endorsement and delivery of bills and notes before maturity ensue, or are intended to result from such negotiation.' " The Court of Lou-

* Kent, Comm., Vol. 2, Sec. 627.

† Delgado & Co. vs. Wilbur & Co., 25 La. An. 82.

London Joint Bank vs. Simmons, House of Lords, Appeal Cases, 1892. p. 201.

isiana was clearly in error in stating that the statute of Louisiana was similar to that of Missouri, under which the bill of lading in the Shaw case was made. The Missouri statute simply provided that "bills of lading shall be negotiable by written endorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." The Louisiana statute goes much farther and says that they "shall be negotiable by endorsement in blank or by special endorsement in the same manner *and to the same extent* as bills of exchange and promissory notes now are." The words *to the same extent* certainly destroys the similarity between the two laws. Had the Missouri statute contained those words the decision of the Supreme Court of the United States might have been different.

But even under the Missouri law the *dicta* in the Shaw case seems to have taken a wider range than the question demanded. The opinion says: "Bills of lading are regarded as so much cotton, grain, iron or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It can not be, therefore, that the statute which made them negotiable by endorsement and delivery or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the represen-

tatives of money, and change the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible.”*

349. But the object of such a law is simply to make of the transferee of a bill of lading a holder for value and cut off the equities of the true owner, just as in the case of a transferee of a bill of exchange or promissory note; in other words, to render bills of lading negotiable paper. Can not the statutory law do, in that respect, for bills of lading what the Common law, the mere law of custom, has done for the ordinary negotiable paper? The statute of Maryland has rendered bills of lading fully negotiable, as we will see presently. It is the law in France and other continental countries of Europe, under a different system. It is the old commercial law of the oldest commercial states of Europe. The reason of such a rule, where it exists, is the same as the reason of the negotiability of bills of exchange and promissory notes, to promote commerce by facilitating financial operations.

350. In an important case in Louisiana, arising under the statute which made bills of lading negotiable and the *bona fide* transferee a holder for value, there were dissenting opinions of two Justices out of five, who contended that the law should be given its full effect. One of them said: “Nor am I disposed to perplex myself with the long discussions and subtle

* Shaw vs. Railroad Co., 101 U. S., 565.

distinctions of the writers on this subject. I think the statutes of our own State indicate with clearness the line of decision for us. The act of 1868, No. 150, after forbidding the execution of warehouse receipts or bills of lading for goods or merchandise, unless the same shall have been actually delivered or shipped, and denouncing heavy penalties for violation of the prohibition, extending even to punishment for five years in the penitentiary, proceeds in its sixth section to provide that the holder of such receipts or bills of lading shall be deemed and taken to be the owner of the merchandise described therein. Section 9 provides that ‘all receipts, bills of lading, vouchers or documents issued by any * * * boat, vessel or railroad * * * , as by this act provided, shall be negotiable by endorsement in blank, or by special endorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are.’ The animus of this statute is unmistakable. It was intended to protect both the carriers and the public—the former by punishing any persons in their employ for issuing false bills of lading or receipts, and the latter by putting such bills or receipts upon the same footing as commercial paper, and protecting the holder in goodfaith with all the privileges and immunities given to bills of exchange and promissory notes.”

351. The other dissenting Justice in that case said of the same statute: “To decide the question presented it is useless, it seems, to refer to the jurisprudence of other States; we have but to open and read

the statute of 1868. It was enacted for the express purpose of fixing, in and for Louisiana, the legal value of a bill of lading. With the provisions of that law planters and merchants are now conversant. The bill of lading has the value of a sale, the stipulation of which can not be changed, can not be limited, except in one way, that indicated in the statute; that is, by the words "*not negotiable*" plainly written or stamped on its face. The law of 1868 was enacted in the interest of commerce; it created one of the most important branches of our credit; it secures the most legitimate transactions; it sanctioned, legalized and protected a fair but imperfect custom which prevailed before its adoption, and it is by far wiser and more equitable than the vacillating and doubtful jurisprudence of other States." *

Between the decision of the Court in that case which virtually nullified the law as to the negotiability of bills of lading, and the dissenting Opinions, we would say that the better judgment is sometimes with the minority.

352. The Maryland statute is framed in the following words: "All bills of lading and all receipts, vouchers or acknowledgments whatsoever, in writing, in the nature or stead of bills of lading for goods, chattels or commodities of any kind, to be transported on land or water, or on both, which shall be executed in this State, or being executed elsewhere, shall provide for

* Hunt & Macauley vs. Railroad Co., 29 La. An. 462 and 464.

the delivery of goods, chattels or commodities of any kind within this State; and all warehouse, elevator or storage receipts whatever for goods, chattels or commodities of any kind stored or deposited, or in said receipts stated or acknowledged to be stored or deposited for any purpose in any warehouse, elevator or other place of storage or deposit in this State, shall be and they are hereby constituted and declared to be negotiable instruments and securities, unless it be provided in express terms to the contrary on the face thereof, in the same sense as bills of exchange or promissory notes, and full and complete title to the property in said instruments mentioned or described, and all rights and remedies incident to such title or arising under or derivable from the said instruments, shall inure to, and be vested in, each and every *bona fide* holder thereof for value, altogether unaffected by any rights or equities whatsoever of or between the original or any other prior holder of or parties to the same, of which such *bona fide* holder for value shall not have had actual notice at the time he became such.’’*

This law was construed by the Court of Maryland, as it must necessarily be, to mean that bills of lading in the cases provided for are negotiable paper in the fullest sense of the law merchant, and that the holder thereof for value and without notice of existing equities, is entitled to the goods the bills of lading

* Maryland's Rev. Code 1878, p. 298.

cover, even against the true owner. In that case, the bills of lading were drawn in St. Louis, covering goods to be delivered in Baltimore, and were held by a holder in good faith, though they were fraudulently pledged by the agent of the owner of the goods. The Court recognized the full negotiability of the bills of lading under the statutes of Maryland. The Court held also that an antecedent debt of the pledgeor was a valid consideration for the pledge under the terms of the statute, contrarily to the rule of some of the States.*

It may well be said that Maryland is so far the only State of the Union in which bills of lading are negotiable paper to the fullest extent.

353. The California statute is in these words: "All the title to the freight which the first holder of a bill of lading had when he received it, passes to every subsequent endorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange."†

This law does not make a bill of lading as fully negotiable as a bill of exchange, because the transferee or pledgee only gets such title as the original holder of the bill himself had to the goods; and the true owner's equities are not cut off by the transfer.

The Wisconsin statute has not established either

* *Tiedman vs. Knox*, 53 Md. 612.
Parsons, *Maritime Law*, Vol. 1, p. 139.
† *California Civil Code*, Art. 2127.

the full negotiability of bills of lading, as shown by the Court of that State.*

354. It is a necessary consequence of such absolute negotiability of bills of lading and of the fact that their transferees in good faith are holders for value, free from all equities, that such holders are entitled to the goods covered by the bills of lading even against the true owners. And the rule obtains whether the transferees are purchasers and therefore owners of the bills, or simply pledgees.

355. It seems clear from the foregoing authorities that, in England and in the United States, excepting the State of Maryland, the endorsee of a bill of lading has no other right to the goods than his endorser had; and that he is not a holder for value, free from the equities of the true owner. It follows, therefore, that the pledgee of a bill of lading has no claim, as such, over the goods, when his pledgeor is not the true owner, or had no right to pledge the bill of lading.

There are exceptions to the rule both in England and in the United States, such, for instance, as when the true owner has put on his agent, or some other person, the *indicia* of ownership, thereby enabling him to deceive third persons dealing with him on the faith of such marks of ownership.

In such cases, the pledgee in good faith of the bill of lading is entitled to the goods even against the

* Wisconsin, Rev. Stat. Sec. 4425.
Rice vs. Cutter, 17 Wis. 351, 358.

true owner, who must suffer the consequences of his ill-placed confidence, as in all dispositions of property by an unfaithful but authorized agent.*

* Benjamin, on Sales, 3d Am. Ed. p. 19 and notes.
Am. and Eng. Ency. of Law, Vol. 18, p. 634.
Conner vs. Crengam, 77 N. Y. 391.
Daws vs. Kidder, 84 N. Y. 121.
Potter, on Bills of Lading, Sec. 470.
Honold vs. Meyer *et al.*, 36 La. An. 585.
Conner vs. Hill, 6 La. An. 8.
Moore vs. Lambeth, 5 La. An. 73.

CHAPTER XXX.

BILLS OF LADING IN THE CIVIL LAW.

356. The law is different on this subject in France, Italy, Belgium and other Civil law countries of continental Europe. From the early dawn of the Commercial law in those countries, during the middle ages, a bill of lading represented both the title and the possession of the goods it covered, and the endorsement and delivery of it effected the transfer of the title and of the possession. The transfer of the bill of lading for value to a party in good faith defeated the rights of even the true owner of the goods. The bill of lading had then and there, consequently, the elements of full negotiability. This was the rule without any legislation to that effect and from the mere force of usage. Troplong says that this principle is fundamental and innate in the interest of commerce, which has, from the beginning, subsisted upon it, and he cites in support of this assertion Casaregis and Valin, the great oracles of the early Commercial law. *

357. As to the claim of the true owner of goods pledged fraudulently by the consignee to a pledgee in good faith, Troplong says also, supporting himself by the great names of Casaregis and Deluca: "And, indeed, where would commerce be when it is so nec-

* Troplong, *Nantissement*, Secs. 323 and 324.

essary that business should be transacted rapidly, when negotiations once commenced can not be put in question; how would matters stand if it were permitted to contend that such goods which have been sold, delivered, pledged, do not belong to him who has disposed of them?" *

And he continues: "The concordance of the Civil law and the Commercial law is manifest here. They fortify and enlighten each other." †

About the principle that the law should protect the owner of goods fraudulently pledged *a non domino*, even to a third person in good faith, Troplong remarks again: "But, says Casaregis, the usages of commerce can not accede to those ideas. '*Hæc nullatenus procedere inter mercatores, quia de eorum universali stylo aut consuetudine, contrarium servatur.*' This custom is certified to by Marquardus; it is consecrated by several local statutes in Europe; Cardinal Deluca recognizes its existence and approves of it. Commercial faith thus demands it. When the possessor of movable property which he holds from his correspondent sells it against the will of the latter, or without his knowledge, or delivers it to a third person in good faith for a valuable consideration, he who receives it from the possessor has the right to retain it. '*Et similiter, ob eam rationem non turbanda libertatis commercii, in dubitationibus terminis, nempe mercatoris, vel mugistri navis, vel*

* Troplong Nantissement. Sec. 76.

† *Id.*, *Ibid.*, Sec. 78.

vectoris, mala fide alienantis, vel distrahentis, seu disponentis de rebus aut mercibus seu respective correspondoris principalis, contra illius mentem, seu ordines: quod alter mercator illorum emptor, seu acquiritor ex aliquo titulo oneroso, non tenetur domino illos restituere, nisi sibi persoluto tali pretio, firmat cardinalis Deluca; De regalib. decis. 115, No. 5 and 6. It is otherwise, of course, when the purchaser is in bad faith. But if he is in good faith, the commercial law is in his favor.” *

The pledgee is in that respect exactly in the same position as the purchaser.†

358. This principle, established first by usage for the necessities of commerce, has passed into the legislation and the jurisprudence of those same countries. The French Code of Commerce, amended by a law of 1872, provides that: “In all cases the lien subsists on the pledge only if the pledge has been placed and has remained in the possession of the creditor or of a third person agreed upon between the parties. The creditor is reputed having the goods in his possession when they are at his disposition in his stores or on his ships, at the custom house or in a public warehouse, or if, *before they have arrived, he has the possession of them by a bill of lading.*” ‡

* Troplong, Nantissement, Sec. 76.

† *Id.*, *Ibid.*, Sec. 74.

Baudry-Lacantinerie, Nantissement, Sec. 31.

Laurent, Nantissement, Secs. 440, 441.

Pont, Nantissement, Sec. 1073.

‡ French Code of Commerce, Art. 92.

359. The holder of the bill of lading is entitled to the possession and ownership of the goods. Let us cite Troplong again :

“The holder of the bill of lading has the right to demand that the goods be delivered to him, and *it is not allowed to raise against him the question of ownership*. He alone is the legal consignee. It is what Casaregis establishes admirably. And it is because the bill of lading gives the holder the exclusive right to receive the goods ; it is because the bill of lading is the only document by virtue of which the goods can be delivered, that the law considers the possession of the bill of lading as the possession of the goods.” *

An important case, directly in point, was decided by the Court of Cassation since the days of Troplong, in which the pledgee in good faith of a bill of lading was decreed to be entitled to the goods against the true owner, though they were pledged against his will by a dishonest agent. †

360. The Commercial law of these countries agrees perfectly on this subject as we see with the principle of the French law, of which we have already spoken, to-wit: that personal or movable property has no following—*Mobilia non habent sequellam*; and that, therefore, the possession of such property is equivalent to title. The bill of lading constituting incon-

* Troplong, Nantissement, Sec. 323.

† Court of Cassation, 1871, p. 148, Banque de Martinique vs. Thomas and others. The Reporter of the Decision remarks that the Court proclaimed with great energy the principle that the pledgee in good faith of a bill of lading must be protected against the claim of the true owner defrauded by an unfaithful agent.

testable possession of the goods, and possession being equivalent to title under the French law, the pledgee of the bill has a right paramount to that of the true owner.

There is, therefore, on this point of the negotiability of a bill of lading and of the legal effect of the transfer to a *bona fide* holder for value, the widest difference between the law of the United States and England, on one side, and of France, Italy, Belgium and Holland, as well as of Maryland, on the other.

361. The consequences of this difference in case of a bill of lading issued in France of goods to be delivered in New York, or *vice versa*, may be of great importance. And here the question would present itself, which, in the case of *Shaw vs. Railroad Company*, 101 U. S., p. 557, the Supreme Court of the United States said it was useless to examine, because the laws of the two States, Missouri and Pennsylvania, from which and to which the bill of lading was issued, were the same on that subject.* That question would be, in one of its phases, whether a bill of lading, so far as the transferee is concerned, is to be governed in its negotiability by the law of the place where it is issued or made, or by the law of the place where the goods that it covers are to be delivered; in other words, whether the *bona fide* holder of a French bill of lading would be recognized in New York as entitled to the goods against the true owner, if they were fraudulently pledged by a factor; and whether the

* *Shaw vs. Railroad Company*, 101 U. S. 562.

bona fide holder of an American bill of lading would be recognized in France as entitled to the goods against the true owner under similar circumstances.

362. The Court of Louisiana also said that it was useless to examine that question in a case where the bill of lading was made in one State and the goods were to be delivered in another State, for the like reason that the laws of the two States were the same on that subject. The Court used similar language to that of *Shaw vs. Railroad Company*, and said: "The bill of lading was signed in the State of Mississippi and the cotton was to be delivered at the city of New Orleans. We are not troubled with any question of the conflict of laws; because we are not advised that the law of Mississippi differs from our own, and the legal presumption is, and we must act upon it, that the law of that State is like our own in any given case where the controversy is not shown."*

363. In both cases it is, therefore, clearly acknowledged that there would be a question as to which law should govern, if the law of the State where the bill of lading is made and the law of the State where the goods are to be delivered were not the same. Having shown how different in that respect the law of France and other countries in Europe, as well as the law of Maryland, is from the law of the several States of the Union and of England, let us now look into that question. We have no pretensions to solve it. We will hardly do more than indicate it.

* *Hunt & McCaulay vs. Railroad Company*, 29 La. An. 458.

CHAPTER XXXI.

364. A bill of lading is, at the same time, a receipt for the goods and a promise to carry and deliver them; consequently, it is a contract as well as a receipt; a contract entered into at one place and to be executed or performed at another place.* The rule is, in such cases, that it is the law of the place of performance which is to govern the rights of the parties under the contract.†

In the contract of the bill of lading the place of performance would seem to be clearly where the goods are to be delivered. The contract is entered into where the bill is drawn, but the obligation of the carrier is to deliver them to the consignee at the place where the latter resides; the place of delivery is presumably, therefore, the place of performance. As the contract is to be construed and executed under the law of the place of performance, the *lex loci solutionis*, it would seem clear then that a bill of lading issued in New York for goods to be carried and delivered in France should be governed, as to the rights of the holder of the bill, by the French law, and that the

* The Thames, 14 Wall. 98.

The Delaware, *Ibid.* 579.

Pollard vs. Vinton, 15 U. S. 7.

Porter, on Bills of Lading, Sec. 63.

† Story, Conflict of Laws, Sec. 280 *et seq.*

Wharton, Conflict of Laws, Sec. 398 *et seq.*

Savigny, Roman Law, Vol. 8, p. 203 *et seq.*

Cox vs. U. S., 6 Pet. 172.

Andrews vs. Pond, 13 Pet. 65.

Scudder vs. Bank, 91 U. S. 406.

bona fide transferee and holder of the bill would be entitled to the goods, even against the true owner, in case the bill was fraudulently disposed of by his agent.

For the same reason a bill of lading issued in France for goods to be delivered in New York should be governed in respect to the holder by the law of the State of New York ; and the true owner of the goods ought to defeat the claims of a holder for value and in good faith of the bill of lading, if the latter was disposed of contrarily to the owner's orders. And the same principle and rule should apply to bills of lading issued in Baltimore on New York, or issued in New York on Baltimore.

365. If we are mistaken in this view of the question and a contrary opinion should prevail, the conflict of law would still exist, but in a contrary sense, in the supposed cases in which the bills of lading are issued under a law different from that of the country where the goods are to be delivered. Then the bill issued in France for goods to be delivered in New York would be governed by the law of France, the *lex loci contractus*, and again the true owner of the goods would yield to the claims of the *bona fide* pledgee. And the bill of lading issued in New York for goods to be delivered in France should be governed also by the *lex loci contractus*, and the true owner then would defeat the pledgee.

366. It has been held in some cases that a bill of lading is a contract of the place where it is issued,

and not of the place where the goods are to be delivered, and that the rights of the holder or transferee are to be governed, in consequence, by the law of the former place. The reasons of this doctrine are substantially, that the bills in the cases in question were transferred as security for advances made at the domicile of the parties, to be refunded there, and that the bills were, therefore, only a mode of reimbursement. The intention of the parties was to vest the title in the goods in the pledgees or transferees of the bills, under the law of their domicile; and the Courts held that this principle disposed of the cases.*

It is true also that it has been generally decided that contracts with common carriers for the shipment of goods from one State or country to another are governed by the *lex loci contractus*, unless the intention of the parties was that the reverse should be the rule between them. The jurisprudence in question has simply established that in the case alluded to, presumably the parties intended that their agreement should be according to the law of the place where they entered into the contract. †

367. The Supreme Court of the United States has stated the rule in these words: “ This review of the principal cases demonstrates that, according to the great preponderance if not the uniform concurrence

* *Bank of Toledo vs. Shaw et al.*, 61 N. Y. 293.
Bank of Rochester vs. Jones, 4 N. Y. 497.
Allen vs. Williams, 12 Pick. 297.
City Bank vs. R. R. Co., 44 N. Y. 136.
Rawls vs. Deshler, 3 Keyes, 572.

† *Dicey, Conflict of Laws*, with Am. notes, p. 581.
Wharton, Conflict of Laws, Sec. 471.

of authority, the general rule that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country."*

368. Wharton on this point says: "When goods are given to a carrier for safe carriage, by what law is the contract, so far as its intrinsic conditions are concerned, to be interpreted? To this question a common answer has been, "the *lex loci contractus*." If we examine the cases, however, appearing to sanction this answer we will find that in all of them the place of contract was the place of the carrier's principal office."†

369. We need go farther, however, in the consideration of this subject, because the question which occupies us is not only that of the relative rights and obligations of the shipper and common carrier as arising from the original contract between them, but

* *Liverpool Steam Co. vs. Phoenix Insurance Company*, 129 U. S. 458.
Peninsular & O. Co. vs. Shand, 3 Moore, P. C. (N. S.) 272, 290.
Lloyd vs. Guibert, 6 B. & S. 100; S. C. L. R. 1 Q. B. 115.
Pope vs. Nickerson, 3 Story, 465.
Jacobs vs. Crédit Lyonnais, 12 Q. B. D. 589.
Brockway vs. Express Company, 47 N. E. 87 (Mass.).

† Wharton, *Conflict of Laws*, Sec. 471.

that of the relative rights also of the transferee or pledgee of the bill of lading and of the owner of the goods. It is not, therefore, only the original contract contained in the bill of lading which we have to consider in this investigation, but also the subsequent transfer or pledge of the bill, and the consequent rights of the transferee or pledgee as affected by the law under which the transfer or pledge has been made.

The two questions may be merged into one, and that is: under what law did the owner of the goods, or the original holder of the bill of lading, and the common carrier intend to contract: under the *lex loci contractus* or the *lex loci solutionis*? If under the former, the subsequent contract of pledge must be governed by the same law; and, *vice versa*, if the original shipper and the carrier intended to submit to the law of the place of performance it is that law which must govern the subsequent pledge of the bill of lading. It is evident, for instance, that if the owner of the goods did not intend to accept the rule of the French law, that possession of movable property is equivalent to title, when he shipped his goods and received the bill of lading, the subsequent pledge of the bill by his agent fraudulently or without authority can not affect him. The converse of the rule is equally true. If the original shipper intended to be governed by the American law, the subsequent pledgee in good faith of the bill of lading would have no valid right against the true owner of the goods if they were pledged against his will. The intention of the origi-

nal shipper and of the common carrier as to the two jaws of the place of the contract and of that of performance is, therefore, the first question to consider on this subject.

370. That the *lex loci solutionis* must govern as to the *nature* of the contract is stated by Judge Story in these words: "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem to be the result of natural justice; and the Roman law has adopted it as a maxim: '*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.*'"*

371. The later writers on the conflict of laws concur with Judge Story on this point. Mr. Dicey, the distinguished English lawyer, even quotes in full the passage of Judge Story's book which we transcribe here; and Doctor Wharton, with his usual learning and knowledge of the Roman law, expresses the same opinion.†

* Story, Conflict of Laws, Sec. 280.

† Dicey, Conflict of Laws, p. 571.

Wharton, Conflict of Laws, Sec. 401.

Cox vs. United States, 6 Pet. 172.

Scudder vs. Union Bank, 91 U. S. 406.

Pritchard vs. Norton, 106 U. S. 124.

Lamar vs. Micou, 114 U. S. 218.

Watts vs. Camors, 115 U. S. 353.

Mr. Dicey quotes also the words of Lord Esher, which are emphatic on this subject: "The business sense of all business men has come to this conclusion, that, if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."*

372. The Civilians are fully as positive on this subject, in declaring that it is the law of the place of performance which governs the rights and obligations of the contracting parties, *unless something in the contract shows that such is not their intention*. The great Savigny, whose very name sounds as high authority in the countries of Civil law, has examined this question from the standpoint both of the juriconsult and the philosopher, and says that in order to determine the seat of the obligation and the special jurisdiction

* Dicey, Conflict of Laws, with Am. notes, p. 571.

under which it should fall, we have to choose between the place where the contract is entered into and the place where it is performed, between its beginning and its end. For which of the two places shall we decide? Not for the first, which is, in itself, a mere accidental fact, of momentary existence, foreign to the essence of the contract, as well as to its development and to its ulterior efficacy. But it is not so of the performance of the obligation. This is of the essence of the agreement. As long as the obligation is not performed, it is uncertain and depends upon the will of the debtor; it is its performance which renders it certain; *it is therefore upon its performance that the attention of the contracting parties has been fixed*. It is, consequently, the place where the obligation is to be performed which will determine the law to which the parties have intended to submit themselves.*

373. Savigny is also of opinion, which is of great importance in the particular question which now occupies us, that in the contract for delivery of goods, the place of delivery is the place of performance, as delivery is performance in such contracts.

Whether the delivery is in execution of the contract of sale, or in execution of the contract of carriage, as evidenced by bills of lading, there can be no possible distinction, so far as the principle is concerned.

* Savigny, *Treatise of Roman Law*, Vol. 8, pp. 203 *et seq.*
Laurent, *Droit Civil*, Vol. 1, p. 165, Sec. 104.
Pascieris, 1849, II, 107.

One of the reasons given by Savigny to support his views is taken from the Roman law, and rests upon the fact that the execution of a contract for the delivery of movables can only be compelled at the place where the goods lie.*

314. It results clearly from those authorities that when the law of the place of performance governs the rights and obligations of the parties to a contract it is simply because they have intended, either expressly or by implication, that it should be so. By their consent, therefore, the *lex loci solutionis* is an element of contract in the premises. That law is not imposed upon them; they have chosen it themselves as the arbiter of their agreement. The Courts, consequently, should not be loath to apply it, whether the Courts are those of the country where the contract was entered into or those of the country where it is to be performed; whether the Courts are applying their home law or a foreign law.

375. It is clearly under the principle that the express or tacit agreement of the contracting parties fixes the law, either *loci contractus* or *loci solutionis*, by which they shall be governed, that the law of the place of acceptance of a bill of exchange regulates the questions of demand, days of grace, protest, etc. The place of acceptance and payment is the place of performance, as acceptance and payment are the performance

* Savigny, *Treatise of Roman Law*, Vol. 8, Sec. 390.
Wharton, *Conflict of Laws*, Sec. 416.
Finch vs. Mansfield, 98 Mass. 149.
Suit vs. Woodhall, 113 Mass. 391.

of the contract of bills of exchange. It is for the same reason that the law of the place of payment of a note or bond fixes the rate of interest, payment being the performance of the obligation to pay the note or bond. The principle has become a rule of the Common law simply because the understanding and consent of the parties have established the custom.

The payment or performance of the obligation is the same thing. Payment, in its legal sense, is the fulfilment of the promise of the debtor of the obligation. In the contract of carriage, the carrier is the debtor of the promise to deliver the goods. Delivery is the performance of his promise. The place of delivery is the place of performance. In default of a contrary agreement, the law of that place should govern the rights and obligations of the shipper and the carrier and of their transferees or assignees.

376. In the case of contracts by bill of lading, the relative facts of the shipper and carrier being or not citizens of the same country; being or not at the place of their common domicil in making the contract, etc., are only circumstances to be consulted in considering the question of the intention of the parties to submit their rights and obligations to the law of one country or the other. Such circumstances are of no importance except so far as they may help in discovering the intention of the parties.*

Is there in the mere fact of goods being shipped to

* Story, Conflict of Laws, Sec. 279.

a foreign port an indication that the shipper and the carrier intend to choose the law of the foreign port as the law of performance of their contract, and to be bound by it, when the bills of lading contain nothing indicative of such an intention? This question was presented for the first time to the Supreme Court of the United States in the important case of Liverpool Steam Company vs. Phœnix Insurance Company, 129 U. S. 397. Goods in that case were shipped in New York to Liverpool on an English vessel, with bills of lading which exempted the carrier from liability for the loss caused by stranding, and exempted also his responsibility for the loss caused by the negligence of his servants. By the law of England the clause in the bills of lading was legal and valid. By the American law and jurisprudence such exceptive clause and restriction of responsibility are not legal and valid. The goods were lost or damaged by stranding of the vessel, proved to have been caused by the negligence of the master and officers. If the case was to be decided under the law of England the shipper could not recover from the common carrier. Otherwise, if the law of the United States was to apply.

After a full review and recognition of the law *loci solutionis* and of the principle that it should govern the case if it were shown that it had been the intention of the contracting parties to submit to it, the Supreme Court said: "There does not appear to us to be anything in either of the bills of lading in the

present case tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made."

It seems difficult to understand how an English common carrier, issuing English bills of lading and undertaking to carry the goods on an English vessel and deliver them to an English port under the terms and conditions of the said English documents, did not look to the law of England in the matter and did not think that he was contracting under it. The remark of the Court might properly apply to the American shipper, but hardly to the English carrier.

377. Further on the Court said: "The contract being made at New York, the ship owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. *Peninsular and Oriental Company vs.*

Shand; Lloyd vs. Guibert, and Chartered Bank of India vs. Netherlands Steam Navigation Company, before cited.” *

378. What might have been the judgment of the Court if the shipment had taken place in England, under the same bill of lading, and the goods destined for, and on their way to the port of New York, had been lost by stranding caused by the negligence of the officers of the vessel? Would the Court have applied the *lex loci contractus* and given effect to the exceptive clauses of the bills of lading? By a parity of reasoning and under the same principles by which it applied the American law to what it called an American contract, it should clearly have applied the English law to what it would then have been compelled to call an English contract.

379. When the Supreme Court, in that case, says that the facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract—how far we are from the rule stated by Savigny, that the place where the contract is entered into is a mere accident, foreign to the essence of the contract as well as to its ulterior efficacy; and that it is the place of performance which is of the essence of the contract, *and upon which the attention of the contracting parties has been fixed*. Upon what place and upon what law, therefore, has the

* Liverpool Steam Company vs. Phoenix Insurance Company, 129 U. S. 458, 459.

attention of the shipper been fixed, when he sent his goods to a foreign port, on a foreign vessel and with foreign bills of lading? Can it be upon any other place than that where he, or his agent or consignee, is to receive the goods? Where he is to demand delivery and possession of them, by legal proceedings, if necessary?

380. But it is evident that, in such cases, the Courts prefer their home laws. In the words of Mr. Dicey: "The distinct and still strong preference, however, of English courts for the *lex loci contractus* must never be forgotten. This preference leads to the result that, in all cases of doubt, and especially where a contract is made in England, our courts hold that the proper law of the contract is the law of the country where the contract is made." *

The same thing may be said of the American courts, of the French courts and probably of the courts of all countries.†

381. The case of the Liverpool Steam Company against the Phœnix Insurance Company only decides one phase of the question which we are investigating, to-wit: that the *lex loci contractus*, and not the *lex loci solutionis* should govern the contract of carriage when the bills of lading do not expressly show that the contracting parties intended that the place of delivery of the goods should be held to be the place of per-

* Dicey, Conflict of Laws, p. 571.

† Merlin, Répertoire, *verbo* Loi, Sec. 6, No. 2.
Laurent. Droit Civil, Vol. 1, Sec. 104.

formance, and that its law should be the law of the contract. The other phase of the question, more directly connected with our subject, is whether the pledge of bills of lading should be governed by the law of the place where the contract of carriage is entered into, or by the law of the place of delivery of the goods, or by the law of the place where the contract of pledge is entered into.

382. We may premise the investigation with the reflection that the pledgeor of the bills of lading can only transfer to the pledgee such rights in the bills, and, therefore, to the goods they cover, which he himself has, under the rule of the Common law and of the statutory law of England and of the States of the Union, except Maryland; and that, on the contrary, in the latter State, under the law which makes bills of lading negotiable to the same extent as bills of exchange, and promissory notes; and in France and other European States, under the principles of the Commercial law which protect the honest vendee or pledgee against all claims; a dishonest agent, or factor, or possessor of personal or movable property covered by bills of lading made to his order, can actually transfer to a *bona fide* pledgee rights which he himself has not to the bills and, consequently, to the goods which they cover; and that the rights thus acquired by the pledgee are paramount to those of the true owner of the goods, even when these were disposed of without his consent.

382. The contract of pledge being an accessory one,

should be governed by the same law which governs the principal obligation, as the existence of the former depends upon that of the latter. It must be presumed that, in that respect, the pledgeor and the pledgee intended, in entering into the contract of pledge, that it should thus be governed by the law by which their principal obligation was to be governed.

But this reflection will hardly afford us any assistance in the solution of our question, for the same difficulty remains: What law is to govern the principal obligation, that of the place of the contract or that of the place of performance, when the principal obligation is the contract of carriage evidenced by bills of lading?

383. If the case of the Liverpool Steam Company vs. the Phoenix Insurance Company has fixed the law and established the principle that, in bills of lading, the *lex loci contractus* should govern the contract, and not the *lex loci solutionis*, then the pledge of bills of lading should be recognized and governed according to the law of the country where they were issued. In such a case the courts of America should apply the law of France to the pledge of bills issued in France on goods delivered in America, and uphold the honest pledgee against the true owner of the goods. And for the same reason the courts of France should apply the law of America to the pledge of bills of lading issued in America on goods delivered in France and uphold the true owner against the honest pledgee.

384. In either case we think that the courts would be but little inclined to apply laws so entirely foreign

to their own and opposed to its spirit. We can hardly conceive of the American courts applying the rule that the possession of movable property is equivalent to title, or of the French courts applying the principle that the owner of goods has a better right than the honest pledgee in a commercial transaction. The discussing of theoretical questions of law and of abstract principles by law writers is one thing, and the deciding of the actual rights of litigants by the courts is another thing. The great Savigny may say that the place where parties enter into the contract is but an accident, and that it is the place where the contract is to be performed which occupies their minds; but a great Court will decide in the case of bills of lading that the contracting parties in entering into the contract of carriage had in view the law of the place where they were at the time, and not that of the place where the goods were to be delivered.

385. The question whether a bill of lading as a contract should be governed by the *lex loci contractus* or by the *lex loci solutionis*, in its construction, validity and effects, has been well examined and discussed, and the Common law authorities bearing upon the doctrine have been fully reviewed by Mr. Porter in his recent work on the Law of Bills of Lading.*

* Porter, on Bills of Lading, Secs. 89 *et seq.*

CHAPTER XXXII.

PLEDGE OF WAREHOUSE RECEIPTS.

386. When merchandise is traveling, the pledge of it is effected by endorsement and delivery of the bill of lading to the pledgee, not because the bill of lading is the symbol of merchandise, as we have seen, but because by the transfer of it to the pledgee, possession is constructively given to him, and he is entitled to delivery of the goods

When the merchandise is not traveling but is deposited and lying in a warehouse, the pledge of it is effected by transfer of the warehouse receipt to the pledgee, for the same reason and with the same effect. The warehouse receipt is like the bill of lading, the title or muniment of title to the goods it covers, and the transfer of it, transfers also the possession of them to the pledgee. It transfers the possession of the goods because the warehouse receipt, like the bill of lading, entitles the holder, and him alone, to the delivery of the goods. The warehouse man has possession vicariously for account of whomsoever is the holder of the receipt, and, therefore, the pledgee of the goods gets the constructive possession of them by the transfer of the warehouse, which is sufficient for the validity of the pledge.

Merchandise forms the whole subject and object of commerce. Whether traveling or lying at home, its

transfer and delivery are constantly a matter of very great importance. When lying at home it is necessarily placed in warehouses, and the transfer of it for purposes either of sale or pledge, taking place a number of times possibly in a single day, can not practically be made, when on a large scale, by actual and corporeal delivery. Necessity, the foundation of commercial law, has, therefore, established the rule that the transfer of merchandise in warehouses is made by transfer and delivery of the warehouse receipt, and that such transfer and delivery constitute the transfer and delivery of the merchandise itself.

387. The warehouse receipt has been for that reason made *quasi*-negotiable and transferable by endorsement and delivery at Common law in the same manner as bills of lading, but subject like bills of lading to the claims or equities of the true owner of the goods. The same rules govern to a certain extent both subjects, and in several States the same statutes control both. The Court of Wisconsin has stated the principle in the following words :

“The receipt of a warehouseman or wharfinger, and the receipt or bill of lading of a common carrier, are contracts of precisely the same general nature and effect, and should obviously be governed by the same rules and principles as to the application of the doctrine of estoppel or negotiability, which with respect to such contracts mean one and the same thing. They are, or may be said to be, negotiable or conclusive in the hands of a *bona fide* assignee or holder for value,

so far as the party executing them, warehouseman or carrier, has made or is bound by the representations contained in them. They are negotiable, or conclusive and valid in the hands of such a holder because the signer, or party by whom they are executed, is estopped, or not permitted to deny the existence of the facts represented in or by them, and which are presumed to have been within his knowledge at the time of their execution.'* *

388. The pledgee of a warehouse receipt is the apparent owner of the goods it covers, as the pledgee of a bill of lading is the apparent owner of the goods which it covers. But such pledgee has, in the one case as in the other, only the rights to the goods which the transferror himself had. If the transferror of the warehouse receipt was not the owner of the goods, or had no power or right to make the transfer, the true owner can recover them from the pledgee.†

* *Hale vs. Milwaukee Dock Company*, 29 Wis. 486.

† *Commercial Bank vs. Hurt* (Ala.), 12 Southern Rep. 568.

Farmers' Bank vs. Blevins, 46 Kansas. 536.

Greenbaum vs. Burnes, 13 Ky. Law R. 267.

Conrad vs. Fisher, 37 Mo. App. 352.

Hanchett vs. Buckley, 27 Ill. App. 159.

Hazard vs. Fiske, 83 N. Y. 287.

Bank vs. Gailey, 92 Penn. St. 518.

First National Bank vs. Boyce, 78 Ky. 42.

Gibson vs. Stevens, 8 How. 384.

McCullough vs. Roots, 19 How. 349.

Insurance Company vs. Kiger, 103 U. S. 352.

Martin vs. His Creditors, 14 La. An. 392.

Same vs. Same, 15 La. An. 165.

Carter vs. Merrill & Co., 14 La. An., 375.

Burham vs. C. V. S. Co., 142 N. Y. 169.

Bank vs. Dean et al., 137 N. Y. 110.

Hanover National Bank vs. Am. D. and T. Co., 148 N. Y. 612.

Corn Ex. Bank vs. Am. D. and T. Co., 149 N. Y. 174.

State Nat. Bank vs. Bryant, 49 La. An. 467.

Young vs. Lambert, 3 Privy Council Report. p. 142.

389. The law of almost all the States of this Union as well as of England, and differently from that of France and other countries of Europe, to-wit: that the possession of personal property is presumptive of but not equivalent to title, applies therefore to warehouse receipts and to the goods they cover. But this must be understood with the qualification that when or where the warehouse receipts are made by statute, as in the State of Maryland, and possibly in Louisiana, absolutely negotiable, or negotiable *in the same manner and to the same extent* as bills of exchange and promissory notes, they are then transformed into negotiable paper and are governed by the principles of the law merchant. In that case the goods they cover pass to the transferee or pledgee of the warehouse receipt, even against the true owner. *

390. We have just said that possibly in Louisiana, as in Maryland, the warehouse receipts were identified by statute with negotiable paper. We used the dubitative form of expression because the Court of Louisiana has not construed the statute in that sense, but the words of the law do not seem to admit of any doubt as to its object on the question of negotiability. The statute of Louisiana provides that: "The receipt issued against property stored in public warehouses, as herein provided for, shall be negotiable and transferable by endorsement in blank or by special endorsement and delivery, *in the same manner and to the same extent as bills of exchange and promissory*

* Tiedman vs. Knox, 53 Maryland, 612.

notes now are, without other formality, and the transferee or holder of such public warehouse receipt shall be considered and held as the actual and exclusive owner, to all intents and purposes, of the property therein described, subject only to the lien and privilege of the public warehouseman for storage or other warehouse charges.”*

This law makes a distinction between public and private warehouses, a distinction which did not exist under the previous law of Louisiana.

But, even under the previous law the rights of the holder of warehouse receipts had been recognized by the Court of Louisiana as paramount to those of the vendor of the goods in the warehouse.†

We should be disposed, therefore, to consider that, under the statute of 1888, the law in Louisiana makes the pledgee in good faith of a public warehouse receipt a holder for value, and, consequently, entitled to the goods even against the true owner, if that statute had not been modified by one of 1890, which puts the transferee of the warehouse receipt behind the seller of agricultural products in certain cases. In every agricultural State the interest of the farmer or planter is evidently one of the principal objects of the law. The statute of Louisiana of 1890, therefore, provides that the vendor of agricultural products of the United States in any town in Louisiana shall have a lien upon them for the price during five days after delivery, and that such lien and preference shall outrank all

* Acts of Louisiana, of 1888, p. 218, Sec. 7.

† Harris, *Parker & Co. vs. Nicolopoulos*, 38 La. An. 12.

other claims, and especially the rights of the holders of warehouse receipts.*

391. The intention of the lawgiver in Louisiana seems clearly to have been, ever since the year 1876, to render warehouse receipts fully negotiable. It is only in 1890, by the law enacted in that year, that such negotiability has been restricted by rendering the lien of the vendor of agricultural products, during five days, paramount to the rights of a *bona fide* holder of the warehouse receipts.

The law of 1876 provides in its fourth section: "That parties who may borrow money on the faith of warehouse receipts representing property in store shall file their affidavit with the pledgees that such property is theirs, the pledger's personal property, or that it is the property of some party for whom the pledger is acting as agent, factor, commission merchant, or in any other fiduciary capacity, and that said party is justly and truly indebted to the pledger in an amount equal in value to the value of the property pledged, as specified in the warehouse receipt for moneys paid to him, or paid by his order and for his account by the party or consignee making the pledge. The cashier of a bank or the secretary of any insurance company incorporated or working under any law in the United States, or of this State, is hereby authorized to administer the oath contemplated under the provisions of this act. Any deviation therefrom shall render the party or parties so deviating liable

* Statute of Louisiana, 1890, p. 51.

for the value of the property, or any excess in value over and above the amount for which it may have been pledged in any manner specified in Sec. 1 of this act, and to the prosecution for perjury and also for obtaining money under false pretenses.”

Section 5 of the same law provides: “That the vendor’s lien of five days’ privilege, now allowed in commercial transactions for the payment of the purchase price, shall not be affected by the provisions of this act, except in case in which a warehouse receipt has been pledged as collateral for money borrowed. The holder of the warehouse receipt shall be considered and held as the actual owner of the property described in the receipt, and no clause of this act shall operate to the detriment or injury of the holder of a warehouse receipt, to the extent of the value of the property specified, made and issued in accordance with and under the provisions of this act; *provided*, that where the factor, agent or pledger may have wrongfully pledged, in violation of this act, any property, the lien of the owner shall be valid even against the third owner of the warehouse receipt.”

And Sec. 8 provides: “That all warehouse receipts, as by this act provided, shall be negotiable by endorsement in blank, or by special endorsement, *in the same manner and to the same extent* as bills of exchange and promissory notes now are.” *

392. This renewed attempt of the Legislature of

* Laws of 1876, p. 113.

Louisiana to render warehouse receipts as fully negotiable as bills and notes was also checked by the courts. The Supreme Court of the United States in construing this statute ignored the question of negotiability, and considering only the power of the factor to pledge the property of the principal, said: "Before the act of 1876 it was settled by unanimous decisions in Louisiana that a factor could not pledge for his own debts the property of his principal. (Authorities.) The act of 1876 does not, as it seems to us, materially enlarge this power so far as the facts of this case are concerned. It makes warehouse receipts the representatives of property in store, and provides for their use to borrow money on; but the implication is clear that their use in that way by a factor for more than the value of his interest in the property would be wrongful and invalid against the owner."*

And the Court decided that the pledgee had no right against the owner because the latter was not indebted to the pledgeor, who was his factor

393. But the Court of Louisiana took once a different view of this law of 1876 and remarked, in an *obiter dictum*, it is true, that: "The act of 1876 has impressed upon it throughout the intention to give this priority to a paraphed warehouse receipt and nothing else, and instead of the halting language of the act of 1868, when it says the transferee of a bill of lading shall be deemed to be the owner of the goods so far as to give validity to his pledge, etc., the

* Insurance Co. vs. Kiger, 103 U. S. 355.

act of 1876 says outright, the holder of the warehouse receipt shall be considered and held as the actual owner of the property described in the receipt. Sec. 5."*

394. In 1888 a law was passed under which public warehouses are to be established, with a kind of *quasi*-official character, and the Legislature of Louisiana again enacted in emphatic language that the warehouse receipts are negotiable instruments as fully as bills and notes; and the Court of Louisiana again decided that they are not.

The statute reads, Sec. 7: "That the receipts issued against property stored in public warehouses, as herein provided for, shall be negotiable and transferable by endorsement in blank or by special endorsement and delivery *in the same manner and to the same extent as bills of exchange and promissory notes now are, without other formality*, and the transferee or holder of such public warehouse receipt shall be considered and held as the actual and exclusive owner, to all intents and purposes, of the property therein described, subject only to the lien and privilege of the public warehouseman for storage or other warehouse charges; provided, however, all such public warehouse receipts as shall have the words "not negotiable" plainly written or stamped on the face thereof shall be exempt from the provisions of this section."†

395. Commenting and adjudicating upon that law,

* Harris, Parker & Co., vs. Nicolopoulo, 38 La. An. 14.

† Acts of 1888, p. 218.

in a recent case in which warehouse receipts, issued in compliance with its provisions, had been given in pledge by a factor to a third holder in good faith, the Court of Louisiana held once more that a factor could not validly pledge the goods of his principal, even under the statute in question, and through such warehouse receipts; and the court again construed adversely to the principle of negotiability the provision of the law so emphatically expressed and so often repeated, that the warehouse receipts were *negotiable and transferable by endorsement and delivery, in the same manner and to the same extent that bills of exchange and promissory notes were.**

In that case the Court reviewed the whole legislation of Louisiana on the subject, from its incipency, quoting the terms used by each successive statute as to the negotiability of warehouse receipts *in the same manner and to the same extent as bills of exchange and promissory notes*, and quoting also the words of the law, that *the transferee or holder of such warehouse receipt shall be considered and held as the actual and exclusive owner to all intents and purposes of the property therein described*. And from these clear and emphatic terms of the statute, the Court drew the conclusion that the warehouse receipt pledged by the factor is not valid in the hands of the innocent pledgee against the true owner of the goods, because a factor has no right to pledge the property of his principal. It is proper to observe that in that case there was no question of the

* Holton & Winn vs. Hubbard & Co., 49 La. An. 715.

superior lien of the vendor of agricultural products, under the law of 1890, the sole exception made by that statute to the complete negotiability of warehouse receipts. The case in question arose under the previous statute of 1888, which made no exception whatever to the rule of negotiability of warehouse receipts. Where, therefore, the law made no distinction the Court has made one, contrary to the established rule of jurisprudence.

396. And, where the statute constitutes the transferee of such receipt "the actual and exclusive owner to all intents and purposes of the property therein described," the Court modifies this provision and reduces the right of the transferee to that of a relative and eventual owner; and that, again, because the Common law principle is opposed to the pledge by the factor. But is not the object of the statute clearly to change in that respect the Common law? If the Common law clashes with a subsequent statute, the latter should prevail. Evidence of the custom, or Common law, is not even admissible against the written law.

397. If the warehouse receipt is rendered negotiable by the statute, a factor's pledge of it should be valid against his principal, just as the pledge of any negotiable effects of the principal by the unauthorized factor or agent is valid in the hands of an innocent pledgee. Upon this last point, there can be no difference of opinion.*

* Kent, Comm., Vol. 2, p. 627.
Saloy vs. Bank, 39 La. An. 90.
Givanovich vs. Bank, 26 La. An. 15.

398. The Court concludes in its reasoning of the case that it can not for an instant believe that the Legislature would enact a law which would enable parties to perpetrate fraud. But by the laws of the largest part of the civilized world, at this moment, if bills of lading, warehouse receipts, and commercial property generally, are pledged by a factor without the consent of the true owner, and, therefore, illegally, the innocent pledgee is protected, not that the laws of those countries are intended to enable parties to perpetrate fraud, but because they can not prevent the fraud. The law is simply impotent in that respect. Fraud may be committed in almost every contract, and yet such contracts, but not the fraud, are formed under the sanction of the law. The commercial interest, which is the public interest, is what the law considers, and not the cases of fraud, which are exceptional cases.

It might be said with equal reason that the laws which create the full negotiability of bills of exchange and promissory notes should not have been established. because they enable parties to commit fraud. And, indeed, what laws could enable factors and other agents more easily to defraud their principals than those which protect the holder for value of negotiable paper feloniously transferred by such dishonest agents?

399. Not by virtue of the principle that the possession of movables is equivalent to title, but under the provisions of their Commercial Codes, which prevail

in that respect over their Civil Codes, in France, in Holland, in Belgium, in Italy, in the German Empire, as well as by statutes in Maryland, in Massachusetts, and in England, the honest pledgee in commercial transactions is protected against even the true owner of the property fraudulently pledged by a dishonest factor or agent.*

The rule is clearly in line with the advance of modern civilization, and it should not be impeded by legislating judiciaries. The interference of the latter has been condemned by Judge Story and by English judges, such as Lords Eldon and Ellenborough.†

400. The repeated checks of the courts on the attempts of the legislative power to legalize the pledges of factors by rendering bills of lading and warehouse receipts negotiable instruments has been the subject of remarks by law writers. Mr. Jones says very pointedly: "In great commercial communities the rules of the Common law with reference to pledges by factors have gradually yielded to the necessities of modern trade and new methods of conducting business. But legislation has been necessary to effect a change of the law, and so strong has been the judicial preference for the rules of the Common law that the legislation intended to change them has sometimes been construed so as to defeat the object intended to be accomplished by it. But in England, and in several of the more important commercial

* *Post*: Sec. 498 *et seq.*, 482, 487. 352.

† *Post*: Sec. 512.

States of our own country, legislation has effected an important change in respect to the powers of factors in favor of persons dealing with them in good faith. The rule has become quite generally established that a factor intrusted with the *insignia* of title, may sell or pledge the property and effectually bind his principal. In reference to warehouse receipts, legislation has, in several States, in another way protected *bona fide* holders of such receipts, and this by making them negotiable with the qualities of negotiable paper.” *

401. We have seen the uselessness of this provision of the law in Louisiana, resulting from the preference of the Court for the rule of non-negotiability of warehouse receipts of the Common law.

We must be permitted to add that all such interference of the judiciary with the legislative will is to be seriously regretted. The wants of the people are better known by their representatives in the Legislatures, especially those of a commercial community. It is neither wise nor proper for judges to check the tendency of legislation, or to impede the course of law by interpreting them too narrowly. Such action of the courts has a nefarious effect upon the commerce of the country, and often interferes with its prosperity.

402. The Factors' Act of the State of New York, intended to protect innocent parties dealing with factors or other agents, and taking from them pledges of

* Jones, on Pledges, Sec. 343.

warehouse receipts, has been variously construed by the courts, and in most cases was held to protect rather the true owner than the pledgee.

In the case of *Cartwright vs. Wilmerding*, 24 N. Y. 526, the court compared the act with the English statute, and decided that the innocent pledgee of warehouse receipts fraudulently disposed of by its agents had a better right under the law than the true owner. The court said: "Since the passage of the statute there is no legal need of saying that any of the documents named in the acts give the holder constructive possession of the property; for the statute, when it calls them 'documentary evidence of title,' makes them equal in validity to possession, and leaves us to call them what they are, with the same legal effect as if we gave to the facts the former designation, which is descriptive of their legal effect. In brief, the effect of the statute seems to be that he who has such documentary evidence of title as gives him the exclusive control of the possession shall be held the true owner of the property for certain purposes, provided the true owner has entrusted him with such evidence for the purpose of disposing of the property. A factor so situated can sell or pledge the whole or any part of the property, or give upon it any lien or security for advances, or, in short, treat it as his own. Entrusted with the disposing control, he can exercise that control; and if he misappropriates the property or its avails his principal must suffer—not the person who has dealt with the factor 'on the

faith' of the position in which the principal has placed him."

And again: "But our statute departed entirely from the Common law, and by making a factor's possession such evidence of ownership as to enable him to do all acts which the true owner might, manifested a totally different intent from that of the English act. Substantially, it left an owner to use his precautions when he selected his factor, thereafter leaving him to be responsible for the acts of his agent and protecting a *bona fide* third person in any transaction fairly effected with the apparent owner. And, for the benefit of trade, the statute said that the delays incident to following up the line of title, and the extent of authority, might be dispensed with, except so far as the statute itself retained them; that is, as to bailees receiving goods for carriage.

"That the course of trade really called for such an act as ours is, upon this construction, is made clear by the course of English legislation on the same subject. Immediately upon the decision in Meeson & Welsby (above cited), Parliament passed an act (5 and 6 Vic., C. 89), giving the same effect to a factor's actual possession as our act gives. And in the same spirit, and as it were for the very purpose of preventing the force of the prior decisions on the point of "*intrusting*" documents, etc., a section of that act provides that an agent possessed of any of the documents of title mentioned in the act, "whether derived *immediately* from the owner of such goods, or *obtained by*

reason of such agent's having been intrusted with the possession of the goods represented by such documents of title as aforesaid, or of *any other* documents of title thereto, shall be deemed and taken to have been entrusted with the possession of the goods represented by such documents of title as aforesaid; and all contracts pledging, or giving a lien upon, such document of title as aforesaid, shall be deemed and taken to be, respectively, pledges of and liens upon the goods to which the same relates," etc.; "and an agent in possession as aforesaid of such goods or *documents shall be taken*, for the purposes of this act, to have been *intrusted* therewith by the owner thereof, unless the contrary can be shown in evidence" (9 Mees. & Welsb. 650, note). This act not only comes up to ours, but overrules (by the Legislature) the decisions, then seen to be inconsistent with the fundamental principle of this new act. Of necessity, these decisions have no force under our act."*

In that case the goods had been consigned from England by the owners to parties in New York, who were instructed to pay the duties on them, but not to deposit them in warehouses. The consignees, holding the invoices, warehoused the goods contrary to orders, and pledged the warehouse receipts to secure advances made to them on the same.

The Court held that the warehouse receipts were sufficient evidence of possession and authority in the

* Cartwright vs. Wilmerdin, 24 N. Y. 530 and 532.

pledgeors to validate the pledge under the New York Factors' Act.

403. But in the more recent case of *Soltau vs. Gerdau*, 119 N. Y. 380, in which the facts strongly resembled those of *Cartwright vs. Wilmerding*, the decision went the other way, and the honest pledgee of the warehouse receipts was defeated by the true owner, whose goods had been fraudulently pledged by the agent. The owner in that case had given his agent a delivery order to enable him to receive, sell and deliver the goods. Thus having possession of them the agent deposited them in a warehouse in his own name and pledged the warehouse receipts to secure his own debt. He therefore had obtained the documents of title, the warehouse receipts, clearly *from having been entrusted by the owner with the possession of the goods*, in the words of the statute.

The owner of the goods claimed them from the pledgee. The Court held that the Factor's Act did not protect the pledgee, though he was in good faith and innocent of the factor's fraud, because the factor could not be said to have been *entrusted with the possession of the goods* in the sense of the statute. Said the Court in speaking of the larceny committed by the agent:

"An owner who is deprived of his property by theft is guilty of no act upon which another has the right to rely, and can not in law be said to intrust the thief with his property." The reflection is illogical.

The master who is robbed by a confidential servant has clearly entrusted a thief with his property.*

404. It is difficult to reconcile those two cases arising under the same law, under similar circumstances, and in both of which the owner of the goods had *entrusted* his property and the evidence of his ownership to a dishonest agent. The decision in the latter case makes no mention of the former one, in which, however, the reasoning of the court seems to be the more forcible and convincing of the two. It is well to observe also that, in the latter case, three of the judges, and not the least distinguished of the court, dissented.

The decision in *Cartwright vs. Wilmerding* gives to the statute a more progressive and enlightened intention than that of *Soltan vs. Gerdau*. In the former case, the Court said: "The English statute, and our own, were manifestly passed for the purpose of increasing the facilities of trade, by legalizing and explaining the cases in which a party could sell, or pledge, property at sea, in the ship at dock, or lying in the warehouse subject to the payment of duties. Historically, the necessities of trade and the custom of merchants had, in both countries, anticipated the statutes. And the benefits of the statutes and the custom are too evident, and too great, to allow us to narrow the construction of the law. And there is no sound principle which would oppose a liberal view.

* *Soltan vs. Gerdau*, 119 N. Y. 380, 392.
Howland vs. Woodruff, 60 N. Y. 73.
Collins vs. Ralli et al., 85 N. Y. 637.
Hentz vs. Miller, 94 N. Y. 64.

tending to enlarge the facilities of transfer; since these acts but follow out the general rule, that every man is bound to take care not to select an agent who will do acts to injure other persons.” *

405. Warehouse receipts and bills of lading as representatives of property, and as means of security in commercial transactions, being closely connected and made the subject of the same legislation, where they are governed by statutes, it is difficult to separate them in the examination of the authorities bearing upon them. They relate also to the pledges by factors, and we shall therefore continue the consideration of the subject in subsequent chapter on Pledges by Factors.

406. In the meantime we may observe that there is another exception to the rule that warehouse receipts are not by the Common law negotiable to the extent of protecting the pledgee against the true owner of the goods, and that is, when the true owner has himself put the *indicia* of ownership on his agent and has thereby enabled him to deceive third persons. In that case the true owner is estopped from contesting the rights of the pledgee. †

This principle applies equally to bills of lading and to all cases in which the owner of personal property has put on another person the *indicia* of ownership.

* Cartwright vs. Wilmerding, 24 N. Y. 529.

† Moore vs. Kidder, 106 N. Y. 32.

Gibson vs. Stevens, 8 How. 384.

Chicago Dock Co. vs. Foster, 48 Ill. 507.

Ditson vs. Randall. 33 Me. 202.

Hazard vs. Fiske, 83 N. Y. 287.

407. The rule has become axiomatic by repeated adjudications. It is plainly stated by Lord Herschell in a recent case. "The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner."*

We have chosen this authority among so many on the same subject because it shows that the principle is not limited to cases in which the owner has actually clothed his agent with documents of title or other evidence or *indicia* of ownership; but that any act or conduct on the part of the owner by which a third person is misled as to the real ownership of the property in the hands of an agent will estop the owner from denying the power of the agent to dispose of the property.

* London Joint Stock Bank vs. Simmons, Law Reports, Appeal Cases, 1892, p. 215.

CHAPTER XXXIII.

408. We must note that the legislation alluded to of several States of the Union and of England by which the pledgees of warehouse receipts are to be protected, when in good faith, even against the true owner of the goods, under certain circumstances, is analogous to that of France on the same subject. There, the person who deposits merchandise in a general warehouse can demand of the warehouseman both a receipt and a *warrant* (so called in the French statute), annexed to the receipt. These documents state the names, profession and domicile of the depositor, the nature of the merchandise and all necessary indications to establish their identity and determine their value.

The *warrant* enables the depositor of the goods to pledge them without removing them from the warehouse and without any trouble. The pledge is effected by the endorsement of the warrant indicating the date of the transaction, the amount of the principal and interest of the debt secured, the time of its maturity, the names, profession and domicile of the creditor. The possession of the goods, without which the pledge would be invalid, is then transferred constructively to the pledgee by delivery of the warrant and held vicariously by the warehouseman for account of the pledgee. This constructive possession is provided

for by Art. 92 of the Code de Commerce, which states that the creditor is reputed to have the goods in his possession when they are at his disposition in his stores, or ships, in the custom house, *or in a public warehouse*; or if, before they arrive, they are transferred to him by a bill of lading.*

The same law prescribes that the first assignee of the warrant should have the endorsement on it recorded on the books of the warehouse, with all the particulars stated in the endorsement, and that the warrant should bear upon itself the certificate of its having thus been recorded on the books of the warehouse. The object of the registration is, as in all cases of registry, to give notice of the pledge to third persons. In default of such registration the creditors of the depositor of the goods in the warehouse could validly attach them and defeat the lien of the pledgee. The registration of the warrant prevents also the depositor from selling the goods or withdrawing them from the warehouse, which he could otherwise do, as he still retained the warehouse receipt after parting with the warrant.

The pledgee of the warrant, who is naturally the pledgee of the goods, can have those sold under the terms provided by the Code de Commerce, after a notice of eight days to the debtor and in the mode prescribed by Art. 93 of the same Code de Commerce, as we have seen before.

The warrant is negotiable and passes by subse-

* Code de Commerce, Art. 92.

quent endorsements, which need not be registered as the first one. And in case the sale of the goods does not produce enough to satisfy the debt, the pledgee has a right of action against the endorsers personally, beginning with the depositor, who is the first endorser of the warrant.*

We see, therefore, that the French law of warehouse receipts is substantially the same as that of this country, but more definite and precise, and giving more complete rights to the pledgee of them

We see also that the warrant which accompanies the warehouse receipt is, to all intents and purposes, a commercial and negotiable paper. And we see finally that the French commercial law concords in this matter with the general and fundamental principle of the law of France and some other countries of continental Europe, relative to movable or personal property, that the possession of such property is equivalent to title, as expressed in the maxim *Mobilia non habent sequellam*.

* Loi du 28 Mai. 1858.
Baudry-Lacantinerie. Nantissement, Sec. 160 *et seq.*
Pont. Nantissement, Sec. 1211.

CHAPTER XXXIV.

PLEDGE OF CORPORATE STOCK.

409. It is now settled, both by the jurisprudence of the Common law States and by the statutes of the Civil law countries, that shares of corporate stocks may be the subject of a pledge. But, formerly and for a long time, it was doubtful whether stocks could be pledged at all, and there was a great diversity of opinions and adjudications of the courts in that respect. It seems strange at the present day that there should ever have been a question on that subject; and the uncertainty of the former jurisprudence in regard to it can only be accounted for by the fact that private corporations and joint stock companies did not have then, either in this country or in Europe, the importance which they have acquired within the last fifty years. There may still be questions as to the modes and effects of the pledge of stock; but there are none as to the principle that that kind of property may legally be pledged. Both in the Civil and Common law countries, all personal or movable property may be pledged, if possession of it can be transferred to the pledgee, either actually or symbolically. The symbolical possession of corporeal property consists in holding the title of it or its muniment of title. The title to corporate stock is the certificate of shares of the stockholder. The transfer of the certificate is

equivalent, therefore, to the delivery of possession of the stock. That was the cause of so much doubt, in former days, as to the legal possibility of pledging stocks. It was thought that, inasmuch as possession could not be given to the pledgee without transferring the stock to him in writing on the books of the company, and such transfer having for its effect to pass the title or general property to the transferee, the transaction might constitute a mortgage but not a pledge. In none of its various branches has the law of pledge taken such a long stride in its modern development as in the mode of assignment of the pledgor's rights to the pledgee, for the purpose of securing a debt, by means of a pledge, without transferring the ownership, or passing the general property of the thing pledged. Such an assignment to the pledgee is, in reality, the most common mode of pledge of choses in action and incorporeal things, at the present hour, in this country.

410. The assignment or transfer of the legal title of choses in action and incorporeal things is not only necessary to put the pledgee in symbolical possession of the pledge, but it is also necessary to give him full control of it, and to enable him to enforce the contract and realize its benefit by sale or otherwise. The same object is had in view, and the same result is obtained, by the adoption of the form of a sale for the purpose of a pledge, as we have seen before. This is equally permissible and valid under the rules of the Civil and Common law, so far as the parties to

the contract are themselves concerned, whatever rights third persons, or creditors of the pledgeor, may have to dispute with the pledgee his lien on the property pledged. In all such transactions, there is clearly a simulated sale, in this, that the ownership of the property remains in the pledgeor, and that the contract is, in reality, one of security. But, when the parties resort to this process without fraud, or injury to others, it is not unlawful. There is nothing more or less in the assignment of stock to the pledgee.

411. It is curious to observe in connection with the progress of jurisprudence on this subject the complete revulsion of legal authorities from the original ideas that stocks could be mortgaged, but could not be pledged. Nowhere can we find the fact so well shown as in the following paragraph, which I transcribe from the excellent treatise of Mr. Cook on stock and stockholders: "Shares of stock may be the subject of a mortgage or pledge. A mortgage of stock, however, is not often made, and unless there is a clear intent to the contrary the courts will treat the transaction as a pledge rather than a mortgage. In fact, it is difficult to ascertain from the cases how shares of stock may be mortgaged, and certain transactions which in a few early decisions were held to be mortgages, would to-day be held to be pledges. There are but few clear cases of a mortgage of stock to be found. It seems that a formal instrument of chattel mortgage of stock, duly executed and registered at the municipal clerk's office as required by

law in case of chattel mortgages, would not constitute an effectual mortgage of stock, and the mortgagee would not be protected where he does not receive the certificate of stock from the mortgagor, or does not obtain a registry of transfer on the corporate books. Where, on the other hand, the certificate of stock is delivered to the creditor as security, it is evident that possession of the property is given to the creditor, but that the debtor still considers the stock to be his. Such a transaction is a pledge, and not a mortgage, and consequently, since the giving of stock certificates as security is almost invariably effected by a delivery of the certificate, a mortgage of stock may be said to be possible, but not probable, or even sensible. The delivery of a certificate of stock with a blank power of attorney, as collateral security, constitutes a pledge and not a mortgage, and the same rule provides even though an absolute transfer or registry is made on the corporate books.” *

412. Whether it is necessary for the validity of a pledge of stock that the transfer should be made or recorded on the books of the corporation, independently of the delivery of the certificate of choses to the pledgee, with or without an endorsement in blank upon it, seems to be yet a very doubtful question in the Common law States, in the absence of statutory provisions. A judge of great learning and legal acumen, in passing upon this point still recently said that there is no doubt that, to constitute a valid pledge

* Cook, on the Law of Stock and Stockholders, Sec. 464.

of stock, there must be some written transfer or contract, necessary as against third parties in the absence of statutory provisions; that the mere handing of the certificate is not sufficient; that there must be a transfer on the books of the company, or a power of attorney, or some assignment or contract in writing, by which the holder may assert title and compel the transfer; and that the only State where, he is informed, delivery of the certificate of stock is sufficient, is Louisiana, and there only by express provisions of the Code.*

413. A writer of high authority, Mr. Waterman, is of the same opinion, and thinks that no pledge of stock is valid, at least as against creditors, without such delivery as will be shown by clothing the pledge with the usual *indicia* of ownership; and that until a transfer is recorded or is entered of record, there is no such change of possession as will prevail against an attaching creditor, unless in cases where due diligence has been used to make the record, and the attachment has intervened.†

414. Mr. Cook expresses a different opinion and states that a pledge of stock is generally made by a delivery of the certificate of shares, endorsed in blank to the pledgee, and a memorandum in writing to the effect that the stock is held in pledge is generally issued and given to the pledgeor, and a copy thereof

* Nesbit vs. Macon Bank and Trust Company, 12 Fed. Rep. 686, Pardee, J.

† Waterman on Corporations, Vol. II, p. 141.

attached to the certificates of stock. But he says also that, however, a mere delivery of the certificate of stock endorsed in blank is sufficient to constitute a pledge without any memorandum in writing to that effect, and without a registry of the same being made on the corporate book. *

415. The pledgee, therefore, who does not have the stock transferred in his name on the books of the corporation, may be exposed to the successful seizure of another creditor, and to the loss of his pledge. And on the other hand, the pledgee who causes such transfer to be made in his name, is exposed to the danger of succeeding to the liability of his transferrer for unpaid stock, or, under the national banking law, to the obligations of the stockholders for an amount equal to that of their stock. The liability of such transferee, even when he is only a pledgee of the stock, is no longer an open question. It has been so decided by the highest Court of this country in several instances.†

416. In the case of *National Bank vs. Case*, 99 U. S. 628, the court held that, when the pledgee causes the stock to be transferred on the books of the corporation in the name of an irresponsible party, but in reality for the benefit of the pledgee, the latter is responsible as a stockholder. The court remarked

* Cook, *Stock and Stockholders* Sec. 465.

† Putnam vs. Upton, 96 U. S. 328.

Webster vs. Upton, 91 U. S. 65.

Sanger vs. Upton, 91 U. S. 56.

Upton vs. Trebilcock, 91 U. S. 45.

National Bank vs. Case, 99 U. S. 628.

that, even in the English cases cited, it is held that, if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham—if, in fact, the transferee is a mere tool in nominee of the transferrer, so that, as between themselves, there has been no real transfer, “but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put on the list of contributories.” The court cited from Thompson, on the Liability of Stockholders, the following paragraph: “A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who from any cause is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out.”

417. This principle is certainly sound and equitable and prevents injustice being done to the creditors of the corporation and the other stockholders. Yet the Supreme Court of the United States has overruled it in a later case, and decided that the pledgee of stock who had the stock transferred on the books of the company, in the name of his own employee, an irresponsible party, for the avowed purpose of avoiding liability as a stockholder, could not be held as such. In that case the pledgee had not received the dividends on the stock during the existence of the pledge, and had allowed the pledgor to receive them. Further-

more, the officers of the company knew at the moment of the transfer to the employee that he was a mere nominee of the pledgee and an irresponsible person. These considerations must have had some weight on the mind of the court. But was there any the less an injustice done by the transaction to the creditors and other stockholders? *

418. Whether the apparent owner of the stock is a pledgee or not, is of no consequence under the law of Congress creating the national banks so far as his liability is concerned. The moment a man appears on the books of the corporation as a shareholder, whether for the purpose of qualifying as a director or for some other reason, even if he does not own the stock which stands in his name, he is liable as a shareholder.†

419. In a case arising in Louisiana where, by statute, delivery of the certificate of stock to the pledgee, without assignment, constitutes a valid pledge even as against third parties and creditors, the pledgee, who had had the transfer of the stock made in his name on the books of the corporation, pleaded in defence of the suit of the receiver holding him responsible as a stockholder, that he had caused such transfer to be made, in error of his legal rights under the law of the State. The defence was decided to be unavailable, the Court declaring that it is well settled that one to whom stock has been transferred in pledge or as collat-

* *Anderson vs. Warehouse Company*, 111 U. S. 479.

† *Finn vs. Brown*, 142 U. S. 56.

eral security for money loaned, and who appears on the register of the corporation as the owner of the stock, is, in the event of the insolvency of the corporation, chargeable as a stockholder for the benefit of creditors.*

420. There are statutes, however, in some of the States by which the pledgees of stock do not incur the liability of stockholders by having the stock transferred in their names, or by which that liability is limited or modified.†

421. It has been also established by jurisprudence that the parties to the contract of pledge may by agreement save the pledgee of corporate stock from liability as a shareholder, in having it declared, either on the certificate of shares or on the books of the corporation, that the transfer made in his name is only for the purpose of the pledge, and that the transferee is only a pledgee, and not the owner of the stock. In such cases, the pledgeor remains liable as shareholder.‡

422. The curious question was once raised, whether the pledgee of corporate stock pledged by the corporation itself could be held liable as a shareholder, under the statute of Missouri, which provided that the stockholders of a corporation, at its dissolution, were liable for its debts; but that executors, trustees and persons holding the stock as collateral security,

* Moore & Janney vs. Jones, 3 Woods, C. C. 53.

† Am. and Eng. Ency. of Law, Vol. 18, p. 701.

‡ Bank vs. Hingham Company, 127 Mass. 563.

Matthews vs. Albert, 24 Md. 527.

were exempted from the liability; and that the pledgeors remained liable as shareholders.

423. The Court of Missouri held that the pledgee of the stock pledged by the corporation itself was not included in the exemption, and had by transfer of the stock to him incurred the liability of a shareholder. The Supreme Court of the United States reversed the judgment and decided that the pledgee in such case came within the exemption of the statute. This was one of the instances in which the Court declared it was not bound to follow the decisions of the State courts. *

424. The doctrine of the liability of pledgees of stock of national banks, to whom the stock is transferred on the books of the corporation, seems to have been very recently modified by the Supreme Court of the United States in a case of great importance. At all events, the Court therein lays down in its own words the following rules, which may hereafter serve for the guidance of the parties in transactions of the sort, to-wit:

That the real owner of the shares of the capital stock of a national banking association may in every case be treated as a shareholder within the meaning of Sec. 5151; that if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if by the direction or

* *Burgess vs. Seligman*, 107 U. S. 20.
Fisher vs. Seligman, 75 Mo. 13.
Griswold vs. Seligman, 72 Mo. 110.

with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of Sec. 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association ;

That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by Sec. 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed ;

That if one receives shares of the stock of a national banking association as collateral security to him for a debt due him for the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of Sec. 5151 ; and

That the pledgee of personal property occupies toward the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor.*

425. Independently of these general principles thus stated by the Court, it recognized in that case the right of the pledgee of the stock, for the purpose of avoiding the liability of a shareholder, to surrender the certificates transferred to him by the pledgor and real owner, and to have new certificates issued to him by the corporation in his own name, *but as pledgee*.

426. The decision is clearly of great importance in financial and commercial transactions in rendering the use of corporate stock easier and safer for the purposes of pledge. There is no reason why the rule should not apply to the pledge of all corporate stocks besides that of the national banks, unless restricted or prevented by statute in particular cases.

427. The law of Louisiana is clear on the subject of the pledge of stock. It is contained in Art. 3158 of its Civil Code, which is in these words: "When a debtor wishes to pawn promissory notes, bills of exchange, *stocks*, obligations or claims upon other persons, he shall deliver to the creditor the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall

* *Pauly vs. Loan and Trust Company*, 165 U. S. 619.

be valid as well against third persons as against the pledgers thereof, if made in good faith.’’

The words of the statute are too plain to admit of any doubt. When a debtor wishes to pledge stock, he shall *deliver to the creditor the certificate of the stock*, and such pledge, *without further formalities*, shall be valid *as well against third persons* as against the pledgeor.

It is evident that, under the law, no writing is necessary and no registry or transfer of the stock on the books of the corporation is required to affect third parties and secure the benefit of his lien to the pledgee. The statute puts stocks on the same footing as negotiable paper in regard to the pledge of them. This is another instance of the advance of the law of pledge in modern or rather recent times for the purpose of facilitating commercial transactions and promoting commerce, and thereby the general prosperity.

The Court of Louisiana has never failed to apply the rule, and, after several adjudications, said that it was time for it to declare that it rested its decision on the principle of *stare decisis*.

428. In the case then under consideration and in the previous cases there were two questions raised by other creditors of the pledgeor, claiming that they were not affected by the pledge of the stock, because it stood yet on the books of the corporation in the name of their debtor, the pledgeor, no transfer of the stock or registry of the pledge having been made.

* Pitot vs. Johnson *et al.*, 33 La. An. 1286.

429. The first question was raised by the corporation itself, contending that, under a provision of its charter, its stock could not be transferred while a matured indebtedness to the company existed on the part of the stockholder; and that third persons had notice of the provision by the publication of the charter.

430. The second question was raised by attaching creditors of the pledgor, who claimed that the stock being still in the name of their debtor and in his possession, as it was not transferred to the pledgee, they had acquired the first lien upon it by their seizure under the rule of law governing movable or personal property.

431. In answer to both questions the court held that by virtue of the aforesaid article of the Civil Code the sale or pledge of the stock of an incorporated company is complete, even as to third persons, by the delivery to the vendee or pledgee of the certificates of stock, and that notice to the corporation is not necessary to the perfection of the sale or pledge, or to protect the stock from seizure by the vendor's creditors, or from other rights of third persons, arising subsequently to the sale or pledge.*

431. In a more recent case the same Court declared that a clause of a like nature in the charter providing that no sale of the stock should be made without

* *Pitot vs. Johnson*, 33 La. An. 1286.

Insurance Company vs. Dry Dock Company, 31 La. An. 149.

Smith vs. Slaughterhouse Company, 30 La. An. 1378.

notice to the company could not affect the rights of the pledgee.*

432. The contrary doctrine seems to obtain in other States of the Union and the preponderance of authorities on this subject are to the effect that the liens allowed by statute to corporations on their stock, for debts due them by the stockholders in whose names the shares stand on their books, will prevail over the claims of the pledgees of the stock, who demand a transfer in their names. Such is the rule, at all events, for debts due the corporation before the pledge. But a debt created after notice of the pledge would not be secured by the lien on the stock of the debtor, for then the corporation is put on its guard and is informed of the adverse right of the pledgee. It is also established that a mere by-law of the corporation which provides that a stockholder can not transfer his shares without the consent of the company, when he is indebted to it, can not affect a pledgee in good faith.†

* *Mineral Water Co. vs. Deblieux et al.*, 40 La. An. 155.

† *Am. and Eng. Ency. of Law*, Vol. 18, pp. 704, 705, 706.

CHAPTER XXXV.

433. The pledgee of corporate stock is entitled to the dividends declared upon the same, on the principle that the fruits or accretions of the thing pledged are part of the pledge itself. If those fruits consist in money, as the dividends of stock, or the interest on bonds or promissory notes, the pledgee having the right to receive them, has equally the right to retain them, but he must credit the pledgor with the amount received. In that respect, such fruits belong to the pledgee, because they operate as a payment of the pledgor's debt *pro tanto* at its maturity. If the fruits do not consist in money, interest or income, then they remain the property of the pledgor, to be surrendered to him by the pledgee on redemption of the pledge.

434. In order to entitle the pledgee to the collection or recovery of the dividends, the corporation must be notified of the pledge, and proper evidence thereof submitted to it. But it is not necessary that the transfer of the stock should be made in the pledgee's name on the books of the company. The right to receive the fruits of the pledge belongs to the pledgee by virtue of the contract of pledge. So much so that, if the pledgor collects the dividends from the corporation in absence of notice of the pledge, the pledgee can compel him to turn them over to him. The pledgor in that case is guilty of the violation of the contract of pledge. The pledgee has not only the right to receive

the dividends of the pledged stock, but it is his duty to do so and part of his obligation to take care of and preserve the pledge whilst it is in his hands.

435. These principles are firmly established in the jurisprudence of the Common law.*

Under the Civil law, the same rules are definitely fixed by statute. The Civil Code of Louisiana is particularly precise on the subject. Its enactments are as follows :

Article 3168. “The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor ; but he can not appropriate them to his own use ; he is bound, on the contrary, to give an account of them to the debtor, or to deduct them from what may be due him.”

Article 3169. “If it is a credit which has been given in pledge, and if his credit brings interest, the creditor shall deduct this interest from those which may be due to him ; but if the debt for the security of which the claim has been given brings no interest itself, the deduction shall be made on the principal of the debt.”

Article 3170. “If the credit which has been given in pledge becomes due before it is redeemed by the person pawning it, the creditor, by virtue of the transfer which has been made to him, shall be justified in receiving the amount and in taking measures to recover it. When received he must apply it to the pay-

* Am. and Eng. Ency. of Law, Vol. 18, p. 703.

ment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge.”

The reason of this is that the object of the pledge is only to *secure* the creditor, and not to benefit him or enrich him in any manner.*

436. The pledgee of stocks has the same right as the pledgee of any other property to sell the pledge without notice and at private sale if it is so stipulated between the parties. It is even the general practice in commercial affairs, and all attempts to treat the sale in such cases as a conversion by the pledgee have failed. It is only in cases where the pledgee, in default of an express agreement and relying exclusively upon the usages of the locality, sold the stock without notice to the pledgeor, that the Courts held him guilty of conversion.†

437. A certain doctrine has been established by some courts and accepted by the law writers, to the effect that the pledgee of stocks is not bound to retain the specific shares belonging to the pledgeor; and that, provided he keeps in hand a corresponding number of shares of the same stock, his pledge is not impaired. The theory of this rule has been curiously stated by the Court of Connecticut in the following words:

“Shares of stock have no individuality, no ease-

* Code Napoleon, Art. 2081.

Troplong, Nantissement, Sec. 437.

† Le Merchant vs. Moore, 150 N. Y. 209.

Williams vs. Trust Company, 133 N. Y. 660.

Thompson vs. Bank, 113 N. Y. 325.

France vs. Clark, L. R. Chancery Division, 1879-1880, p. 830.

ments. One share does not differ from another share of like stock in form, characteristic or value. Each share represents simply an undivided proportionate interest in the ownership of the corporation. It entitles the owner to a certain right in the management, profits and ultimate assets of the corporation, precisely like that which every other share owner enjoys. Certificates of stock, which have earmarks, are not the stocks. They are only the evidence of the ownership of the stocks. They are muniments of title, like title deeds. They have no value save as evidence of the thing owned, which has nothing individual, distinguishable or peculiar about it. Courts have therefore said that no good reason existed for requiring that a pledgee of stock should at all times preserve a careful separation of distinguishable certificates connected with each transaction of pledge, and maintain the identity of each certificate distinct and unbroken. They have said that the essential thing was that he hold at all times the required shares of stock ready to be delivered when called for, and in recognition of this fact and of the right enjoyed by the pledgee to transfer the stocks held by him in pledge into his own name, they have held that a pledgee fully preserves the rights of the pledgeor if he at all times until the termination of the pledge retains similar stock in amount equal to that pledged. This has been held of pledges in their ordinary forms as well as of those incidental to margin transactions. *Nourse vs. Prince*, 4 Johns. Ch. 490; *Horton vs. Morgan*, 19 N. Y. 170; *Gilpin*

vs. Howell, 5 Pa. St. 41; Price vs. Gover, 40 Md. 102; Hubbell vs. Drexel, 11 Fed. Rep. 115; Cook on Stock and Stockholders, Sec. 469.'*'

438. The origin and the substance of this jurisprudence are accurately stated by Mr. Dos Pasos in his book on Stock Brokers.† It appears to be well established both in this country and in England.‡

439. But it is clearly a wide departure from the principles of the law of pledge; and the reasons of the court of Connecticut, like those of the previous decisions, are more reasons of convenience than anything else. Shares of stock have an individuality and a very distinct one; they are numbered and bear the name of the owner, and consequently have an earmark. That they represent simply an undivided interest in the assets of the corporation does not affect their own individual existence; nor does the fact that they are of the same value as other shares of the same stock. If they were not susceptible of identification and of individualization the consequence would be that they would not be susceptible of being pledged. The thing pledged must be a thing certain, distinct, definite, identifiable and describable.

* Skiff vs. Stoddard, 63 Conn. 218.

† Dos Pasos, on Stock Brokers, p. 141 *et seq.*

‡ Langton vs. Waite, 6 L. R. Eq. 165.

LeCroy vs. Eastman, 10 Mod. 499.

Price vs. Gover, 40 Md. 115.

Gilpin vs. Howell, 5 Pa. St. 41.

Horton vs. Morgan, 19 N. Y. 170.

Stewart vs. Drake, 46 N. Y. 449.

Taussig vs. Hart, 58 N. Y. 425.

Thompson vs. Toland, 48 Cal. 100.

Wood vs. Hayes, 81 Mass. 375.

Worthington vs. Torney, 34 Md. 193.

Colebrook, on Collateral Securities, Sec. 306 *et seq.*

That particular thing must remain in the possession of the pledgee during the existence of the pledge. No substitution of another thing, even alike and of the same value, can be made to it. These are elementary principles. Furthermore, the thing pledged is in the hands of the pledgee only to secure him. It is there as a deposit. The pledgee has no more right to sell and replace it than to sell and replace the deposit. Where is there any law or principle of law to make a difference in the pledge of stock? Even if, under the doubtful jurisprudence of the Common law, the pledgee has the right to *use* the pledge for his own benefit, he certainly can not sell it in view of replacing it.*

440. The only plausible reason for the ruling which recognizes the right of the pledgee of stock to sell it and replace it, is that it is thus tacitly agreed upon between the parties; in other words, that, considering the established usage of brokers in similar cases, there is an implied authority from the customer to the broker to sell or pledge the stock to raise money to meet his advances in respect to the transaction with the customer, and that the latter only reserved to himself a right to call for a retransfer to him of a similar number of shares on payment of the advances.

441. Such was the principal reason of Chancellor Kent's judgment in the early case of *Nourse vs. Prime*, which has been the foundation of that doctrine in the United States †

From the case of the broker and customer, the rule

* Cook, on Stock, Sec. 471.

† *Nourse vs. Prime*, 4 Johns. Ch. 490 and 7 *Id.* 69.

has drifted down to all cases of pledges of stock. The same reason, but only that reason, may validate the acts of the pledgee in those cases, to-wit: That the custom or usage of the locality establishes the right of the pledgee to sell and replace the stock, and that the custom enters into and forms part of the contract. If there is no such implied agreement between the pledgeor and the pledgee of stock, how far has this contract departed from its original principle, which prohibited the use of the pledge by the pledgee and assimilated such use to a theft; in the words of Justinian: *Si creditor pignore utatur furtum committit*.

442. The same question of the right of the pledgee of stock to sell and replace pledged shares by others of the same kind was raised in France in a celebrated case, to which we have already referred, and was decided adversely to the pledgee by the Court of Cassation. It was there held, in substance, that, in default of an agreement to that effect between the parties, the pledgee was guilty of a breach of trust, and that the pledgeor was not presumed to know of the custom which would authorize such disposition of the stock even if the custom existed.*

443. It is not amiss to observe here that some of the Civilians are of opinion that the pledgeor may consent to the substitution of the stock by the pledgee and that such an agreement is valid between the parties, but that, in such case, the contract is no longer that of pledge, properly speaking.†

* *Ante*, Sec. 208.

† Laurent, Du Gage, Sec. 494.

CHAPTER XXXVI.

PLEDGE OF POLICIES OF INSURANCE.

444. Policies of insurance may be pledged, whether they are of insurance against fire, or on life, or of marine insurance. The pledge of policies of insurance on life, especially, is of frequent use in the United States. Persons who have no other property to pledge may insure their lives and pledge the policies. It is in many cases the last resort of the needy borrower. The policy of insurance being a chose in action may be pledged at Common law by the simple delivery of it into the hands of the pledgee. It has been decided that such pledges are valid even without endorsement, or written transfer or assignment. The Court of Massachusetts in a recent case has again stated the rule. It said: "It is well settled that the delivery of such a chose in action as an insurance policy for a valuable consideration, with the intent to vest the title in the assignee, operates as a valid transfer, and that the equitable interest thus acquired by the assignee will be protected and enforced in the courts of law."*

445. But such is the rule only when the policy is not payable to any particular person named in the policy; otherwise the endorsement by the payee as well as

* *Hewins vs. Baker*, 161 Mass. 324.
 Ellis vs. Kreutzinger, 27 Mo. 311.
 Grant vs. Kline, 115 Pa. St. 618.

delivery to the pledgee is indispensable for the validity of the pledge. There seems to be no doubt on this point. It is in that case of the policy of insurance, as it is of any other chose in action payable to a person named in the instrument.*

446. But however simple and legal the pledge of insurance policies in this form may be, and however generally adopted it has been in the United States, it is more common in England to mortgage than to pledge life insurance policies; and creditors there are better satisfied with the latter mode of security.†

447. Under the rule of the Civil law that no pledge is valid against third persons unless it is evidenced by an act in writing, stating the amount of the debt secured, and describing the property pledged, is the pledge of a policy of insurance legally effected by simple endorsement and delivery?

* Jones, on Pledges, Secs. 145 and 147.

Colebrooke, on Collat. Securities, Sec. 426.

Am. and Eng. Ency. of Law, *verbo* Pledge, p. 651.

Collins vs. Dawley, 4 Colo. 138.

Norwood vs. Guerdon, 60 Ill. 253.

Stout vs. Yaeger Milling Company, 13 Fed. Rep. 802 (Mo.).

Sherman vs. Fire Insurance Company, 46 N. Y. 526.

Merrifield vs. Baker, 11 Allen, 43.

City Bank vs. Ass. Company, 32 W. R. 658.

Crossley vs. Insurance Company, 4 Ch. D. 421.

Webster vs. Insurance Company, 15 *Ibid.* 169.

Soule vs. Bank, 45 Barb. 111.

Chapman vs. McIlrath, 77 Mo. 39.

West vs. Insurance Company, 31 Ark. 476.

Latham vs. Bank, L. R., 17 Eq. 205.

Bruce vs. Gardner, L. R., 5 Ch. 32.

Hart vs. Forbes, 60 Miss. 29.

Crain vs. Paine, 4 Cush. 483.

State vs. Tomlinson, 45 N. E. 1116 (Ind.).

Insurance Company vs. Grant, 33 A. 1060 (N. J.).

Palmer vs. Merrill, 6 Cush. 286.

Currier vs. Howard, 14 Gray, 511.

Norton vs. Bistacagua Insurance Company, 111 Mass. 582.

† Salt vs. Northampton, L. R. Appeal Cases 1892, p. 1.

Deering vs. Bank, L. R. Appeal Cases 1886, p. 20.

The question is certainly not free from doubt. The pledge of commercial effects is excepted from the requirement of the written act, as we have seen before, and simple delivery of the thing pledged, in such cases, is sufficient according to the various Codes of Commerce of the countries of continental Europe. But is a policy of insurance a commercial effect? Nothing in the provisions of those Codes indicates it to be such.

448. In the State of Louisiana the law provides that: "When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith."*

A policy of insurance does not come within the category of either promissory notes, bills of exchange or stocks. Is it an obligation or a claim upon another person? It is an aleatory obligation, and at best an eventual or contingent claim upon the insurer. Yet such a right may be the subject of the contract of pledge.

But is it the kind of right which may be pledged, under the article of the Code, by a simple delivery of the evidence of the right? What is the right of the

* Civil Code of Louisiana, Art. 3158.

insured under the policy of insurance?—to recover the insurance money in case of loss of the subject insured. The policy is only evidence of the contract, but not of the loss.

We may find an analogous case in the contract of an architect to build a house. It creates on the part of the owner an obligation to pay the architect when the house is built. The latter could pledge his right under the contract. But would the simple delivery of the contract be sufficient to effect the pledge? The contract is evidence of his right to be paid if he builds the house, but it is not evidence that he has built it. A written act of pledge would clearly be necessary to pledge the contract in that case.

Is the claim of the insured a *credit*? Clearly not before the loss. Is it a credit after the loss? It would seem so. But it is not a credit *negotiable* in the sense of the law. In that case it would look as if the policy of insurance could not be pledged without the written act. Article 3160 of the same Code provides that: “When the thing given in pledge consists of a credit not negotiable, to enable the creditors to enjoy the privilege above mentioned it is necessary not only that the proof of the pledge be made by authentic act or by act under private signature, duly recorded, but that a copy of this act shall have been duly served on the debtor of the credit given in pledge.”

449. The question so far does not seem to have drawn the attention of the lawyers of Louisiana, though the pledge of policies of insurance in that State

is of frequent use. The validity of such pledges by written assignment, but not by an act stating the amount of the debt secured, has never been contested on the ground that the form of assignment was not sufficient. The form of such assignment is usually in words endorsed on the policy to the effect that, "for value received," the insured transfers the policy to the assignee. The statement of *value received*, in case of a sale of the policy would be sufficient, because the price needs not be declared in the transfer. But in the case of a pledge, the amount of the debt secured must be stated under penalty of nullity. The terms *assignment* or *transfer* are generic. They may be applied equally to a sale, exchange, gift or pledge of the thing. When the transfer is for the purpose of a pledge, unless it contains all the requirements of that kind of contract, under the rule of the Civil law, it is clearly not sufficient. We should bear in mind that, when the policy or any evidence of a right is transferred to the creditor for the purpose of security only, the transferor still retains the *ownership* of the thing transferred. If the ownership itself were transferred, clearly there would be no pledge or any other contract of security. The transferee could not have a lien on his own property.

450. In all policies of insurance there is a clause by which the underwriter stipulates the forfeiture of the insurance in case the insured transfers the policy without the consent of the insurer. The contract of insurance is a personal one. The insured has no more

right to substitute another insured to himself than the insurer has the right to substitute another insurer to himself. The reason of this clause is manifest.

The transfer of the policy is equivalent to the substitution of a new insured to the one with whom the insurer has contracted and whom he accepted for the purposes of the insurance. His consent to the change evidently should be first obtained before he is bound by the transfer.

451. Therefore, when for the purpose of a pledge, the policy is transferred or assigned to the pledgee without the consent of the insurer, the latter can demand the forfeiture of the insurance, and, in case of loss, if he has not waived the stipulation of the clause, he may refuse payment of the indemnity both to the pledgee and the insured.

452. But it is only the insurer who can avail himself of the clause of forfeiture. Neither the pledgeor nor his other creditors can demand the nullity either of the pledge or of the policy. And the insurer himself can claim the forfeiture of the policy, but not the nullity of the pledge. The pledgee in that case is at the mercy of the insurer, but of him alone, so far as the recovery of the insurance money is concerned.

It is expressly said in *Merill vs. New England Insurance Company*, 103 Mass. 245, 252, of a provision that the policy should be null and void if assigned without the written consent of the company, that it "does not prevent the transfer or pledge of the policy. It reserves to the company the right to give or to re-

fuse its consent to such transfer ; and, if made without its consent, to avoid its contract altogether. The effect of the condition is to defeat the policy ; not to defeat the transfer." *

* Heevins vs. Batner, 161 Mass. 325.
Lynde vs. Ins. Co., 139 Mass. 57.
Ellis vs. Kreutzinger, 27 Mo. 311.

CHAPTER XXXVII.

453. In relation to life insurance policies, there is a great diversity of opinion on the subject of the pledge and transfer of the policy to a person who has no interest in the life of the insured. It may be considered as a settled principle that no policy can be validly *issued* in favor of a person who has no such interest. But when the policy has been originally issued to a person having the insurable interest, can it be subsequently transferred to one who has no interest in the life of the insured? On that question the Courts of this country are divided and wide apart.

Life insurance was at first unpopular. It had to overcome strong prejudice in its incipency. In France and various countries of Europe it was for a long time prohibited by statute. Whether the beneficiary had an interest or not in the life of the insured, the contract was considered a wager and a speculation on human life. It is still held immoral, and, therefore, void, by some Courts, and reprobated by some law writers whenever the beneficiary has no insurable interest in the life of the insured.

454. One of the law writers says: "All the objections that exist against issuing a policy to one upon the life of another, in whose life the former has no insurable interest, exist against his holding such policy by mere purchase and assignment from another. In either case the holder of such policy is interested in the death

rather than the life of the insured. The policy of the law forbids such speculations based on the continuance of human life. It will not uphold a practice which incites danger to life, and it substantially declares that no one shall have any claims under a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another. He may purchase a policy on the life of another in whose life he has no interest, as a mere speculation; the door is open to the same practice of gambling, and the same temptation is held out to the purchaser of the policy to bring about the event insured against, as if the policy had been issued directly.”*

455. In France, where the popular prejudice against life insurance lasted longer than in this country, the same views are entertained by some of the writers on that subject. One of them expressed his opinion in these words: “If the one who takes an insurance on the life of another has no interest in the existence of the latter, the contract he enters into will give him a contrary interest; that is, an interest in the abridgment of the life of the insured. It is no longer a question of social advantage, it is public morality which rises against such a combination. The insurance under such circumstances contains a *votum mortis*. It is a speculation, a wager on human life,

* May, on Insurance, Sec. 398.

speculation in which the desire of an early death of the insured is implied.” *

456. In Belgium legislation has fixed the prohibition absolutely. The law provides that: “The insurance on the life of a third person is null if it is proved that the beneficiary had no interest in the life of the insured.” †

457. But, reverting to the question of the validity of the assignment to a person having no insurable interest, of a life policy originally issued to one having the required interest in the life of the insured, we see that the Supreme Court of the United States has adopted the prohibitive doctrine and established the rule that, under its jurisprudence, no one can have any right in a life insurance, if he has no interest in the life of the insured, whether he is the original holder of the policy or the subsequent assignee of it. The Court stated the doctrine in the following terms, basing its judgment upon grounds of morality and public policy :

“The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in

* Note in *Journal du Palais*, 1880, p. 1121, *et seq.*

† Laws of the 11th June, 1874.

its own name. Such a policy would constitute what is termed a wager policy, or a speculative contract upon the life of the insured, with a direct interest in its early termination.

“ It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relation of the party obtaining the insurance, either as a creditor of or surety for the assured, or from the ties of blood or marriage to him as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and the child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured.

“ Otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies have a

tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy.

“The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.” *

458. The opposite doctrine is established in the State of New York, and it is interesting to observe the contrast of the reasoning of its court with that of the Supreme Court of the United States, contrast which is all the more curious that both decisions are based upon principles of morality and public order. The Court of New York says: “This policy was

* Warnock vs. Davis, 104 U. S. 778.

See also Insurance Company vs. Lucks, 108 U. S. 503.

Cammack vs. Armstrong, 117 U. S. 597.

Hayes vs. Lapeyre, 48 La. An. 754.

Life Insurance Company vs. Hazzard, 41 Ind. 116.

Stevens vs. Warren, 101 Mass. 564.

Bombach vs. Insurance Company, 35 La. An. 233.

Stokell vs. Kimbal, 59 N. H. 13.

Johnson vs. Van Epps, 14 Brad. 201.

taken out by Lester, for the benefit of his wife. It was an insurance upon his own life for her benefit. While one can not insure life in which he has no interest, every person can insure his own life for any sum upon which he can agree with an insurance company. A life insurance is not like fire insurance, a contract of indemnity, but a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life. (Delby vs. The India and London Life Insurance Company, 28 Eng. Law and Eq. 312; Rawls vs. American Life Insurance Company, 35 Barb. 357; S. C., 27 N. Y. 282; Insurance Company vs. Bailey, 13 Wall. 616.) Like every other contract to pay money such a policy is a chose in action with all the ordinary incidents of every other chose in action. It is abundantly settled in this State, that one who takes an insurance upon his own life may make the policy payable to any person whom he may name in the policy, and that such person need have no interest in the life insured, and that if the policy be valid in its inception, the party taking it may assign it to any person as he could assign any other chose in action, and that the policy will continue valid in the hands of the assignee, although he has no interest whatever in the life insured. So a creditor may take out a policy on the life of his debtor, and the policy will continue valid although the creditor has been paid and has thus ceased to have an interest in the life of the insured. In Ashley vs.

Ashley (3 Simons, 149), A insured his life and afterward assigned the policy to B, for a nominal consideration ; B's executors then sold and assigned the policy to D for a nominal consideration, and then D's executors sold it to E ; and it was held that they could make a good title to the policy, and that E was bound to complete his purchase. This case was cited and approved in 3 Kent's Coms. 370, note, and has since been cited with approval in several reported cases in this State. In *St. John vs. The American Mutual Life Ins. Co.* (2 Duer, 419), DUER, J., a judge very learned in the law of insurance, writing the opinion, held that an assignment of an insurance policy to one having no interest in the life insured was valid, and he said : ' The objection to the recovery in this case assumes, and such was the argument, that there can be no absolute sale of a subsisting policy, and that its assignment is only valid when as collateral security for an antecedent debt ; but, as we understand the law, a written promise to pay a sum of money is just as properly a subject of transfer, for value, where it depends upon a condition, as where it is absolute ; and we can, therefore, make no distinction between the rights of a *bona fide* assignee of a policy and those of an assignee of a mortgage.' He then cited *Ashley vs. Ashley*, and further said : ' This case, therefore, proves not only that the absolute sale of a life policy does not affect the validity of the contract, but that the assignee for value, in the event of the death of the assured, is entitled to the

same remedies as his personal representative when the title to the policy is unchanged.' This case was affirmed in this Court (13 N. Y. 31), and the doctrine was there again announced that a valid policy of insurance effected by a person upon his own life is assignable, like an ordinary chose in action. CRIPPEN, J., writing the opinion of the Court, said: 'I am not aware of any principle of law that distinguishes contracts of insurance upon lives from other ordinary contracts, or that takes them out of the operation of the same legal rules which applied to and govern such contracts. Policies of insurance are choses in action, and are governed by the same principles applicable to other agreements involving pecuniary obligations.' And he further said: 'I do not agree with the counsel for the defendant, that the assignee must have an insurable interest in the life of the assured in order to entitle him to recover the amount of the assurance. If the policies were valid in their inception, the assignment of them to the plaintiff did not change the liability of the company.' In *Valton vs. The National Fund Life Assurance Company* (20 N. Y. 32), it was held that one who has obtained a valid insurance upon his own life may dispose of it as he seems fit, and that it is immaterial that the assignee has no interest in the life. In *Rowls vs. American Life Insurance Company* (*supra*) it was held that it is not necessary that a party holding a policy on the life of another should have an insurable interest in such life at the time of the death to make the policy valid

if it was valid in its inception. (See also *Clark vs. Allen*, 11 R. I. 493; *Law of Assignments of Life Policies*, by Hine & Nichols, 73, 75, 81; *Bliss on Life Ins.* (2d ed.) Secs. 23, 26, 30.

“The rule, as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and *bona fide* transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case and the assignee in the other may hold and enforce the policy if it was valid in its inception, and the policy was not procured or the assignment made as a contrivance to circumvent the law against betting, gaming and wagering policies. It follows, therefore, that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it and bequeathing it by will, and it has been well said that if he could not do this, life policies would be deprived of a large share of their utility and value.” *

459. The same doctrine has been adopted in several of the States of the Union, as shown by the cases which we cite below.†

* *Olmstead vs. Keyes et al.*, 85 N. Y. 598.

† *Dixon vs. National Life Insurance Company* (Mass.), 46 N. E. 430.
United States Mutual Association, vs. Hodgkin, 4 App. D. C. 516.
Meyers vs. Schumann, 54 N. J. Eq. 414.
Mutual Company vs. Allen, 138 Mass. 24.
Eckel vs. Renos, 41 Ohio St. 232.
Martin vs. Stebbins, 126 Ill. 387.
Fitzpatrick vs. Insurance Company, 56 Conn. 116.
Ritter vs. Smith, 70 Md. 261.
Murphy vs. Red (Miss.), 14 So. Rep. 761.

460. The principle underlying this doctrine is that the contract of life insurance is not, like that of fire or marine insurance, a contract of indemnity, but is an ordinary agreement to pay a certain sum of money, under certain circumstances, and for a certain consideration. Were it a contract of indemnity, when the policy is transferred as collateral security, it is clear that, if the debt thus intended to be secured were paid before the death of the insured, or maturity of the policy, the pledgee could have no right to the insurance money; there being no damage suffered by him from the death of the insured, there would be no ground for an indemnity.

461. For a long time in England the prevailing doctrine was, that life insurance was nothing else but a contract of indemnity, and, therefore, that when the insurance was taken by a creditor on the life of his debtor, payment of the debt by the representatives of the debtor caused the policy to lapse, and extinguished the right or cause of action against the insurer. The principle was supported by no less an authority than Lord Ellenborough, who said in the then leading case of *Godsall vs. Boldero*, that, if the damage which was at first supposed likely to result to the creditor from the death of his debtor, the insured, was wholly obviated by payment of the debt, the foundation of any action on the ground of such insurance failed.*

462. But this decision has been expressly overruled

* *Godsall vs. Boldero*, 9 East, 72.

by the well known and important case of *Dalby vs. India and London Life Insurance Company*, and the jurisprudence on this subject seems to be now settled in England to the effect that a policy of life insurance is not a contract of indemnity, and that, if it was valid at its inception the transferee needs not have an interest in the life of the insured. The language of the Court in this case is very positive. It says: "The contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always, except when bonuses have been given by prosperous offices, the same on the other. This species of insurance in no way resembles a contract of indemnity." *

463. The jurisprudence of England on this subject is consequently in perfect accordance with that of New York and the other States whose decisions we have cited above. Under that jurisprudence, a creditor who insures the life of his debtor, paying the premium himself, is entitled to the insurance money at

* *Dalby vs. India and London Life Ins. Co.*, 28 Eng. Law and Eq. 312.

See Joyce on Insurance, Vol. 1, Sec. 26, and notes.

the death of the insured, even if the debt has been paid by the latter. The creditor, in such a case, holds the policy of insurance as any chose in action for which he has given value, and for the payment of which he has his right of action against the debtor of the chose in action.

464. The same principle has been recognized in France, although both the legislation and jurisprudence of that country are yet meagre on the subject of life insurance. The Court of Cassation only some years ago decided that a creditor who had insured for his own benefit the life of his debtor, with the latter's consent, and paid the premiums, the debtor refusing to pay the same, was entitled to the insurance money, although the debt had been paid by the debtor's executors after his death. This was clearly a recognition of the doctrine that the life insurance is not a contract of indemnity, but a simple contract to pay money under certain conditions and for a legal consideration. The French jurists call it very expressively "a commutative and aleatory contract of capitalization." There is still, however, a strong opposition in France to this theory among the law writers.*

* Court of Cassation, 1880, p. 1121, Chevalier C. Chayer.
Fuzier-Herman, Code Civil, Art. 2071, Nos. 11, 12, 13.

CHAPTER XXXVIII.

465. Under the jurisprudence of the Supreme Court of the United States and of the courts of the States which concord with it, as we have shown in the cases cited, the creditor having only an insurable interest in the life of his debtor to the extent of his debt, is only entitled to the insurance money to the same extent; and the excess, if any, of the same insurance should be paid over to the heirs or representatives of the insured. And such is the rule even when the creditor has paid the premiums. In such case he is entitled to the reimbursement of what sums he has paid to the insurer; but the final balance goes to the heirs or representatives of his debtor

It is what was decided in *Cammack vs. Lewis*, 15 Wall. 643, and affirmed in *Warnock vs. Davis*, 104 U. S. 775, the court holding in both cases that the insurance on the life of the debtor, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterward made on account of it; and that the assignment was valid only to that extent.

466. The court might have given another reason for its ruling, a reason to be found in the law of pledge, as valid and forcible at least as the reason said

in the decisions to be founded on equity and good conscience. The moment the policy of insurance is assigned to the creditor as security of the debt, the assignment necessarily covers the contract of pledge between the creditor and the debtor. In the nature of things it can not be anything else: any more than when other choses in action are pledged, or when promissory notes or bills of exchange are pledged. We now come again to the constant distinction which must be made between the assignment or transfer of such things for the purpose of *security* only and the assignment or transfer of the same things for the purpose of conveying not only the legal title, but also the *ownership* of them, as in cases of sale, or exchange, or donation, or any such transactions as have not for their object the securing of an obligation. In the pledge the pledgeor remains the real owner of the thing pledged; the pledgee is only the apparent owner. When the debt is paid the pledgeor is entitled to the return of the thing pledged, whether the pledge has been effected by actual delivery of a corporeal thing, under the garb of a sale, or by means of an assignment. When a promissory note is pledged, and the pledgee recovers its full amount, if it exceeds that of the debt clearly the pledgee is bound to turn over the excess to the pledgeor. Why should there be any difference in the assignment of a policy of life insurance made only to secure a debt?

467. Whether, therefore, life insurance is or is not a contract of indemnity, it seems evident that, when

the policy is the property of a debtor who assigns it to his creditor as a pledge, the latter, after receiving payment from either the debtor or his heirs or representatives, is bound both in law and in equity to re-assign the policy to them.

468. But when it is the creditor himself who insures the life of the debtor for his own benefit, and when he takes the policy in his own name, payable to himself, pays the premium and does not charge them to the debtor, can it be said that he is then the owner of the policy, and, in that case, can he recover both the debt from the debtor and the insurance money from the insurer? It was so decided by the Court of Cassation in France, in the case which we have cited above. The decision was based upon the principle that the transaction was exclusively between the creditor and the insurance company, in which the debtor had no interest, and in which the creditor had contracted for his own benefit, the contract being one simply for the payment of money and not one of indemnity.

469. In such a case, however, would the converse of the rule be equally applicable, and if the creditor had first received payment of the policy could he still demand payment of the debt from the debtor or his representatives? There does not seem to be any good reason why he should not, if the insurance and the debt had no connection together; but the subject is still an imperfectly explored region of the law of life insurance as applied to the security of debts.

CHAPTER XXXIX.

PLEDGE OF MARGINS.

470. The purchase of shares of capital stock is generally done through a stock broker, who purchases in his own name and *carries* the stock for account of the customer. The latter deposits a sum of money, comparatively small, in the hands of the broker, as security of the price of sale, for which he is responsible. The sum deposited is called a *margin*. The Common law jurisprudence in this country has established the principle, that the contract of pledge is formed in that case, tacitly if not expressly, between the broker and the customer, the former being the pledgee and the latter the pledgor of the money deposited. And when, in the purchase of the stock, delivery is made by the vendor to the broker, the pledge extends to the stock delivered as well as to the money deposited. The contract of pledge arises, in such cases, by implication of the intention of the parties and of the consent of the customer, combined with the fact that the money and the stock are in the possession of the broker. The implication of the agreement of the parties results from the usages of the place where the transaction takes place. The broker is presumed to rely upon the tacit pledge for his security, and the customer is presumed to grant the security, without which the broker would not

buy and carry the stock at his own risk. This double presumption is based upon the fact that such is the custom in transactions of that kind in the locality where they take place. It is evident that if there is a pledge in that case, and none by express agreement, it must be implied in the manner that we indicate. The contract being implied from the custom, all that is customary under similar circumstances should be considered as entering into and forming part of the contract.*

471. The Court of New York has been prominent in settling the principle that the relation of pledgee and pledgor is tacitly created between the broker and the customer when the former purchases stock and carries it for account of the latter. The subject was thoroughly examined and expounded in the leading case of *Markham vs. Jandon*, where the Court said: "The broker undertakes and agrees:

"1. At once to buy for the customer the stocks indicated.

"2. To advance all the money required for the purchase beyond the 10 per cent. furnished by the customer.

"3. To carry or hold such stocks for the benefit of the customer so long as the margin of 10 per cent. is kept good, or until notice is given by either party that

* Cook, on Stock, Sec. 457 *et seq.*

Jones, on Pledge, Sec. 495 *et seq.*

Colebrooke, Collat. Securities, pp. 527, 528.

Dos Passos, Stock Brokers, 112.

Overton, on Liens, 205.

Am. and Eng. Ency. of Law, Vol. 18, p. 707.

the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker.

“ 4. At all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock.

“ 5. To deliver such shares to the customer when required by him upon receipt of the advances and commissions accruing to the broker ; or,

“ 6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

“ Under this contract, the purchaser undertakes—

“ 1. To pay a margin of ten per cent. on the current market value of the shares.

“ 2. To keep good such margin according to the fluctuations of the market.

“ 3. To take the shares so purchased on his order, whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker.

“ The position of the broker is twofold. Upon the order of the customer, he purchases the shares of stocks desired by him. This is a clear case of agency. To complete the purchase he advances from his own funds, for the benefit of the customer, ninety per cent of the purchase money. Quite as clearly, he does not in this act as an agent, but assumes a new position. He also holds, or carries the stocks for the benefit of the purchaser, until a sale is made by the

order of the purchaser, or upon his own action. In thus holding or carrying, he stands upon a different ground from that of a broker or agent, whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of a broker as such. In so doing, he enters upon a new duty, obtains other rights, and is subject to additional responsibilities.

“The plaintiff insists that the relations between the parties is, first, that of principal and agent, or broker, when the shares are ordered to be purchased for the account of the customer, and were so purchased; that in advancing the money to complete the purchase, the relation of debtor and creditor is created, and that thereupon the broker becomes a pledgee of the stock for the money advanced in its purchase.

“The defendants, on the other hand, insist that the relation of the parties is wholly by force of a mutual and dependent contract; that defendant's agreement to hold or carry the stock was dependent on the plaintiff to furnish them with the means to do so, and that when the plaintiff failed in that respect, the obligation to hold the stock ceased, and the right to sell it was complete.

“In the case of a pledge it is well settled that, upon default by the debtor, the property in the subject of the pledge does not thereby become absolutely vested in the creditor, but that the general property still remains in the debtor. To cut off this claim, the creditor may resort to judicial process, or he may sell

without judicial process, upon giving notice to redeem, and giving notice of the time and place of sale. (Wilson vs. Little, 2 Comst. 443 ; 2 Kent Com. 581, 582 ; Story, on Bailments, Sec. 287, 308, 310). Until those of these modes is resorted to the right to redeem remains. (*Id.*)

“If the theory of the defendants is correct, the plaintiff being himself in default in the performance of the contract on his part, can maintain no action ; and if the defendants gave notice to file the margin, they had the right on failure so to file to sell without further notice.

“A pledge is a delivery of goods by a debtor to his creditor to be kept till the debt is discharged ; or, again, it is a bailment of personal property as security for some debt or engagement (2 Kent, 577 ; Story, on Bail., Sec. 286). Ordinarily, all goods and chattels may be the subject of a pledge, including money, debts, negotiable instruments and choses in action (Story, Sec. 289). While the terms of a pledge require that there should be a delivery of the article, it is not necessary that there be an actual manual delivery. It is sufficient if there be any of those circumstances which, in construction of law, are deemed sufficient to pass the possession of the property. Thus, goods at sea may be passed in pledge by a transfer of muni-ments of title, or goods in a warehouse by the delivery of the key. ‘So if the pledgee has the thing already in possession, as by a deposit or loan, the very contract transfers to him, by operation of law, a

virtual possession thereof, as a pledge, the moment the contract is completed' (Story, Bail., 297, and Auth., *supra*). Possession may also be temporarily parted with, as between pledger and pledgee, without destroying this relation, as where so delivered for and with an agreement for redelivering; or where it is delivered to the owner as special bailee or agent (*Id.*, Sec. 299).

"While it is true that the dealer, in the present case, never had actual possession of the property, which he claims to have pledged, he had it sufficiently to bring his case within the principles of the law of pledge. The substance of the first branch of the transaction is this: The plaintiff calls upon the defendants, who are brokers, to purchase for him certain shares of railroad stock, and furnishes him with \$1000 for that purpose, agreeing to pay interest on advances he shall make in the purchase, and commissions. The defendants make the purchase, having themselves advanced ninety per cent. of the purchase money. They bring to the plaintiff the certificates of the stock thus purchased by him and for him, and deliver them to him as the owner thereof. He thereupon hands them back to the defendants, to hold as security for their advance on the purchase, with interest and commissions. If these precise forms had been observed, no one would deny that the delivery of the certificates would have constituted a strict, formal pledge. In my opinion, the transaction as it took place amounted to the same thing. To have deliv-

ered the certificates to the plaintiff, and that the plaintiff should then have returned them to the defendants, to be held by them as security for the advance, in their purchase, would leave the parties in precisely the same situation as if the defendants had retained them for that purpose; the form of a delivery to the plaintiff, and a redelivery by him to the defendants, being waived by agreement of the parties. It comes fully within the principle I have already quoted from Story on Bailments, that where the pledgee has the thing in his possession, the contract of pledge operates as a delivery, the moment the interest is completed (Story, Bailments, Sec. 297). The certificates are appropriated as security for an engagement, to wit: the payment of the advance, with interest and commissions. The possession and the delivery are complete in the abbreviated manner I have described. The right of redemption, in other words, the ultimate ownership of the property in the plaintiff was clearly provided for and was the prominent idea in his mind. There is no evidence here that the plaintiff necessarily intended a sale of the stock purchased. He bought it for the purpose of making money. If he could make more money by holding it permanently than by selling, no doubt he would continue to hold. But I do not find that the intention to have or to suffer a sale, or the reverse, forms an element in the definition of a pledge. Nor do I see how the fluctuating value of the property can be invoked to determine the character of the transaction. It can not be doubted, upon the authorities

cited, that shares of stock in an incorporated company, however unsubstantiated may be its character, or however fluctuating their value, may form the subject of a pledge equally with a cargo of wheat, a vessel, or any other specific article. In my judgment, the contract between the parties was, in spirit and in effect, if not technically and in form, a contract of pledge. To authorize the defendants to sell the stock purchased, they were bound first to call upon the plaintiff to make good his margin ; and failing in that, he was entitled, secondly, to notice of the time and place where the stock would be sold ; which time and place, thirdly, must be reasonable. (See Auth. *supra.*)” *

472. We have quoted so extensively from the decision because it is, in reality, the foundation of the jurisprudence which establishes that there is a tacit pledge between the customer and the broker who purchases and carries the stock. But this doctrine was not adopted with unanimity even by the Court of New York, and its dissenting judges combated it with forcible reasons, contending that the contract of pledge does not arise impliedly in such cases, but that the transaction between the broker and the customer is simply one of agency and remains such to the end.

It must also be observed that the Court refused to hear evidence of the custom of the stock brokers in similar transactions. It would seem that if the pledge only arose by tacit understanding of the parties from the usages of the place, the proof of such usages

* *Mackham vs. Jaudon*, 41 N. Y. 239.

should have been received to show what the tacit understanding was. Even if the rules of the brokers were contrary to the Common law principles of the pledge, unless those rules were unlawful, they ought to have governed the transaction, which was presumed to have been formed under them.

It is substantially what one of the judges said in his dissenting opinion. He stated that the mutual understanding and intent of the contracting parties not being expressed in the agreement as to the rights of the broker to sell the stock under the circumstances of the case, they should have been gathered from the usages and customs well known and established in the business. There is some difficulty in the interpretation and legal effect of an agreement to buy stock on a margin in the usual way, and to carry the same on such margin. Usage and custom are not admissible to control the settled legal force and effect of a contract that is not ambiguous or couched in terms of technical, doubtful or unsettled meaning. But usage and custom give meaning to terms that to one who is ignorant of the usage are wholly novel or even unintelligible. In such case evidence of usage and custom is received, not for the purpose of varying and altering a contract, as overriding rules of law prescribing its effect, but for the purpose of ascertaining and settling what the contract was ; what, in point of fact, was the mutual understanding and intent of the parties.* It is difficult indeed to understand how

* *Markham vs. Jaudon*, 41 N. Y. 254.

the Court could find that the relation of pledgeor and pledgee arises impliedly from a transaction which is governed by custom, without holding that the custom itself enters into and forms part of the agreement, and therefore should be proved if necessary to show the meaning of the contract and the intention of the parties.

CHAPTER XL.

473. This theory of the admissibility of the proof of usage for the purpose of ascertaining the intention of the contracting parties under certain circumstances, was acknowledged and applied by the Court of Connecticut in a case in which it agreed with the Court of New York as to the principle that the relation of pledgeor and pledgee springs from the agreement of the broker to purchase and carry stock for his customer. The question in Connecticut was not, as in New York, whether the usage could be proved under which a broker sells the stock if the margin is not made good, without an express authority from the customer to sell in such case. The question was whether the usage could be proved under which the broker, as pledgee, can repledge, against the rule of the Common law, without express authority from the customer. The principle is clearly the same in both cases. In both the question is whether, by a tacit agreement, the usage becomes part of the contract.

474. The Court of Connecticut said: "The right to repledge for his own debt is clearly one not enjoyed by a Common law pledgee. Bunnell & Scranton undoubtedly exercised it over the stocks and securities in their hands for the purpose of obtaining the capital requisite to carry their customers' purchases. They even went so far as to pledge the stocks and securities of one customer *en bloc* with

those of other customers. This course of dealing, however, was in conformity with the established custom and usage in the stock market in Connecticut and New York. When the plaintiffs gave their orders to Bunnell & Scranton they understood that the orders were for execution in the New York Stock Exchange. They knew the relation of Bunnell & Scranton to this exchange and their mode of transacting business therein through New York houses, members thereof. They must, therefore, be held to have contemplated and authorized a course of dealing in accordance with the rules and customs of that market. The authorities are not uniform as to the effect of trade usages upon the contractual obligations of parties. We think, however, that the better authority goes to this extent, at least, that when one employs another to deal in a particular market, he will be held as intending that the mode of performance should be in accordance with the established customs and usages of that market, as long as the custom or usage is neither immoral, unlawful, unreasonable, contrary to the express agreement of the parties, nor such as to change the intrinsic character of the undertaking. *Robinson vs. Mollett*, L. R., 7 H. L., 802; *Nourse vs. Prime*, 4 Johns. Ch. 490; *Lawrence vs. Maxwell*, 58 N. Y. 19; *Samuels vs. Oliver*, 130 Ill. 73.

“In view of the character and necessities of the business undertaken by brokers in carrying for their customers stocks bought upon a margin, and for the

purposes which the custom of repledging was intended to serve, we are not prepared to say that it is open to any of the enumerated objections. Courts have commonly sanctioned it. *Nourse vs. Prime*, 4 Johns. Ch. 490; *Lawrence vs. Maxwell*, 53 N. Y. 19; *Oregon Company vs. Hillmers*, 20 Fed. Rep. 717; *Dos Passos, on Stock Brokers*, 357; 18 Am. and Eng. Ency. of Law. 707.

“This custom therefore became part of the contract between Bunnell & Scranton and their customers. The contract thus gave to Bunnell & Scranton the implied authority to repledge. Such authority it has long been recognized could be given by a pledgeor. *Ogden vs. Lathrop*, 65 N. Y. 158; *Price vs. Gover*, 40 Md. 102; *Dos Passos, on Stock Brokers*, 662; *Story, on Agency*, Sec. 118.”*

475. The authority of the case of *Markham vs. Jaudon* has been repeatedly followed in the State of New York in subsequent adjudications and may be considered as firmly established. But as late as the year 1876, in the case of *Baker vs. Drake et al.*, the Court was still divided both on the question of the pledge, as arising impliedly between the broker and the customer, and on the question of the admissibility of evidence to show the usages of stock brokers who purchase on a margin and carry the stock.† In the case of *Gillet et al. vs. Whiting*, however, decided in 1890, the Court was unanimous in holding that the

* *Skiff vs. Stoddard*, 63 Conn. 218. 219.

† *Baker vs. Drake et al.*, 66 N. Y. 518.

relation existing between the customer and the broker who buys and carries the stock, is that of pledgeor and pledgee; but the question of admissibility of evidence of the customs of stock brokers was not raised. The main point in the case was as to the *quantum* of damages that the pledgeors were entitled to by reason of the conversion of the pledges.*

476. The Court of Connecticut has in the same case of *Skiff vs. Stoddard* adopted the doctrine of the tacit formation of the contract of pledge between a broker and his customer, and carried it even farther than the previous decisions.

The Court cited *Markham vs. Jaudon* as the leading case in New York on that subject and quoted chiefly from it in declaring that the relation of pledgeor and pledgee springs from the transaction between the customer and the broker, in which the latter purchases and carries stock. In the Connecticut case, the defendant contended for the contrary principle. The Court said in that respect: "If we look for judicial sanction for the proposition of the defendant we find none outside of the Supreme Court of Massachusetts, and no present authority there for the precise interpretation here contended for. In *Hayes vs. Wood*, 15 Gray, 375, which was decided in 1860, before the stock broker was as familiar a figure as he is to-day and before the law governing his calling was as well established, that court devoted a few lines only to this subject, but gave

* *Gillet et al. vs. Whiting*, 120 N. Y. 402.

countenance to the defendant's claim in that it said of a margin-purchasing contract that it was strictly a conditional one, to deliver so many shares upon the payment of so much money, and that until the money was paid the right to have performance did not accrue.

“ In the latter case of *Covell vs. Loud*, 135 Mass. 41, the Court made it clear that it did not regard the statement of the contract in *Hayes vs. Wood* exhaustive, but simply expressive of its distinct feature. It apparently did not intend to adopt a new position as respects what was the distinctive feature of the contract, since it cited approvingly the language of the former case; but it did, in plain terms, state that there was incorporated into the contract an agreement on the part of the broker “to purchase and hold or carry” for the customer. In neither of these cases is the matter under consideration treated at any length, and it is not altogether easy to gather from them just what the Court's construction of the undertaking of the parties in its full scope was. If we interpret their language aright, their doctrine is, substantially, that the broker in margin-purchasing contracts like those under consideration agrees, in consideration of the customer's payments, to purchase certain stocks or securities and hold or carry them, or an equal number of like shares or securities, ready to be delivered to the customer when required by him, and upon demand and payment therefor to deliver the same to him.

“ This enlarged construction of the contract, in so far as it brings within its scope what by established usage is done in its execution, obviates to that extent, of course, the inconsistencies which we have commented upon as existing between the obligation and performance. Doubtless the construction might be so far elaborated as to embrace within the terms of the contract all the features which characterize the course of dealing under it. The result, however, would not then be to remove the difficulties attending the situation. The inconsistencies and incongruities, to be sure, would no longer arise from without, but they would still continue to exist within the contract and be as inexplicable as ever. The contract would become one inharmonious and inconsistent in its parts. So long as the interpretation of the contract preserves as its distinctive feature the principal proposition that the customer purchases merely the right to have delivery to him in the future, at his option, of stocks or securities at the price of the day of agreement, and its corollary that the customer derives no right, title or interest in the stocks or securities until final performance, the difficulties in the way of harmonizing the situation are bound to exist. The fundamental difficulty grows out of necessary attempt in some way to transform the customer, who enjoys all the incidents and assumes all the risks of ownership, into a person who in fact has no right, title or interest, and to create out of the broker, who enjoys none of the incidents of ownership and assumes not a particle of its

responsibility, a person clothed with a full title and an absolute ownership.'* But the court was not unanimous in this decision, and a very strong dissenting opinion was presented by one of the judges, contending that the contract of pledge does not arise impliedly between the broker and the customer when the former purchases stock and carries it for the latter on a margin.

477. We said that the court of Connecticut had gone even farther than that of New York in the doctrine that the relation of pledgeor and pledgee arises impliedly between the customer and the broker who purchases and carries. In the same case of *Skiff vs. Stoddard* it was held that the pledge exists in such circumstances whether the broker holds for account of his customer the identical and specific stock which he purchased for him, or whether he disposes of it in the course of his business and replaces it by other stock of the same kind. And by the same principle the court decided that the fact that the identical shares originally bought for each customer were not kept separate and apart from other like shares by the broker did not destroy the pledge.

This doctrine is based upon the theory that shares of stock have no individuality, no earmarks; that they only represent undivided proportionate interests in the ownership of the corporation; and that they are, therefore, of unnecessary or impossible identification.†

* *Sheriff vs. Stoddard*, 63 Ct. 214, 215, 216.

† *Skiff vs. Stoddard*, 63 Ct. 218.

478. The theory is supported by high authority, both from the courts and the law writers of this country. But it seems doubtful that it is fully established and consecrated by the jurisprudence of the Common law. It is on its face contrary to the fundamental principles of the contract and the law of pledge, which prescribe that only a specific thing, susceptible of delivery and specification, can be the subject of a pledge, and that the pledgee loses all his rights as such the moment he abandons the possession of the thing pledged. Under the rules of the Civil law, by which the nature of the pledge is better understood, better defined and better established, it could not be held for a moment that the pledgee of stock who disposes of it and replaces it by other stock of the same kind still remains a pledgee of the substituted stock.

478. We have so far only considered the question of the broker's pledge when it is stocks that he purchases and carries on a margin for his customer, and when the stock is actually delivered by the seller. In such cases, under the authority of the decisions of the courts of New York and Connecticut, both the money deposited as a margin by the customer and the stock are pledged by implication to the broker. The pledge extends to the stock because it is delivered to the broker and, therefore, in his possession. But, in the transactions known as the purchases of *futures*, it is clear that there can be no pledge of the stock, inas-

much as it is not delivered ; or rather, the pledge only arises when delivery is made by the seller at the stipulated time.

The rule is evidently the same in the cases of purchase of produce and other articles of merchandise as in the purchase of stocks. There can be no pledge of the same if there is no delivery to the broker. This was decided by the Court of Illinois in a case of the purchase of grain for future delivery.*

479. In closing this subject it may be proper to say, however clear it is that the broker holds as a pledge the *margin* deposited in his hands by the customer for the purpose of securing him, that the question whether the stocks or merchandise, even when delivered, are also pledged to him by implication, is not solved with sufficient certainty to be considered as a settled point of American jurisprudence. There is no unanimity in the decisions of the courts of the two States which have passed upon it. The court of Massachusetts is clearly opposed to it. The Supreme Court of the United States has not yet been called upon to decide it, nor have the various courts of the other States of the Union.

* Corbet vs. Underwood, 83 Ill. 324.

CHAPTER XLI.

PLEDGE BY FACTOR.

480. It is well known that at Common law a factor can not pledge the property of the consignor without his consent. The reason of this is obvious. If he pledges it for his own debt, he commits a breach of trust. If he pledges it for the debt of the consignor, he does an unwarranted act by exceeding his authority. The property is consigned to the factor, or placed in his hands, to be sold for account of the owner. Any other disposition than the sale of it is in violation of the factor's mandate. The owner wants his property sold for purposes of his own, and does not want it pledged. This is what was said in a still recent case decided by the House of Lords and quoted by the Supreme Court of the United States, in *Allen vs. St. Louis Bank*, 130 U. S. 32.

Lord Chancellor Selborne said in the case alluded to: "It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell and an authority to mortgage or pledge is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money; but when the goods are deposited by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods

does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title unaccompanied by any indebtedness, to their full equivalent in money." *City Bank vs. Barrow*, 5 App. Cas. 664, 670.

In that case the English court said:

"When there is a power by law to sell, a purchaser may obtain from the vendor, even as against the true owner, a good title, but that can not extend by implication to a pledge.

"Barrow was a leather merchant in London. Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 1½d. per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight and send back the hides. Barrow sent out a large number of the hides; they were tanned and freight was procured for them, but in the meantime Bonnell had obtained from the Toronto Bank advances on his own account on bills and hypothecated the hides to the bankers as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honored. They were not duly honored, and the bankers (who had acted in entire ignorance of the transactions between Barrow and Bonnell) claimed to retain

the bills of lading and the hides until their demands were satisfied.”

It was held that under the circumstances of the case Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow, entitled to pledge Barrow's goods, and that consequently the bankers could not set up any title to the goods as derived from him against the real owner.*

481. It is evident that we fall here under the general principles of the law of mandate or agency. The factor is a mere agent, with a limited and specified authority. His acts beyond that authority are illegal, as all unauthorized acts of an agent. When and where the Common law is changed by statute, and the factor is permitted to pledge the property of the consignor or owner, then and there the contract of mandate between the factor and the principal is entered into by them with the understanding that the statute will govern their relations, and the factor will have the power to pledge as well as to sell. The law, then, is read into their agreement. It is, therefore, still by the consent and authority of the owner of the goods that the factor may pledge them. But a usage of trade for banks to take from factors, as security of loans or other indebtedness, pledges of

* Gill vs. Kymer, 5 Moore, 503.
Fielding vs. Kymer, 2 B. & B. 639.
Newsom vs. Thornton, 6 East. 17, 2 Smith, 207.
Guichard vs. Morgan, 4 Moore, 36.
Martini vs. Coles, 1 M. & S. 140.
Delauney vs. Barker, 2 Stark, 539.
Boyson vs. Coles, 6 M. & S. 14.
Daubigny vs. Duval, 5 T. R. 604.
McCombie vs. Davies, 7 East. 5, 3 Smith, 3.

goods known to be held by them as factors is unlawful and does not protect the pledgees against the true owner.*

482. The Common law was changed in that respect by statute in England in the early part of this century. The necessity of permitting factors in certain cases to pledge the goods in their possession, for the improvement of commerce, by affording security to persons dealing with them, was felt and provided for as early as at that time by acts of Parliament known as the Factors' Act, namely: the 4 Geo. 4, C. 83; 6 Geo. 4, C. 94, and 5 and 6 Vict., C. 39.

The first section of the last mentioned act, which is still in force, provides in substance that any agent with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien or security, *bona fide* made by any person with such agent so entrusted as aforesaid, as well as for any original loan, advance or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and that such contract or agreement shall be binding upon and good against the owner of such goods, and all persons interested therein, *notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.*

* Allen vs. St. Louis Bank, 120 U. S. 20.

483. The act provides further that such pledge by the factor is only valid if the pledgee had no notice that the factor was not authorized by his principal to pledge the goods; or that the factor was acting in bad faith; or that the debt secured by the pledge was an antecedent obligation of the factor to the pledgee. Consequently, the pledge by a factor to a pledgee in good faith, who knows that he is dealing with a factor, is valid, in England, even against the owner of the goods, who has not authorized the pledge of them if the pledgee is not aware of the want of authority in the factor.*

It has been held, under the provisions of that statute, by the highest authorities, that knowledge that the agent making the pledge is a factor, without further notice that he is acting *mala fide* and beyond his authority, does not deprive the pledgee of the protection of the statute.†

484. The State of New York soon followed the example of England in setting aside the old principle of the Common law, that factors could not pledge the property of their principals; and in the year 1830 the New York Factor's Act was passed, based upon the English statute. It provides that every factor or other agent, entrusted with the possession of any bill of lading, custom-house permit or warehouse-keeper's

* Benjamin, on Sales, Sec. 809.

† Allen vs. St. Louis Bank, 130 U. S. 37.

Navulshaw vs. Brownrigg, 1 Sim. N. S. 573, and 2 D. M. and G. 441.

Vickers vs. Hertz, L. R. 2 H. L. Sc. 113.

Kaltenback vs. Lewis, 10 App. Cas. 617.

receipt for the delivery of merchandise, and every such factor or agent, not having the documentary evidence of title, but entrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, should be deemed to be the true owner thereof, so far as to give validity to any contract made by him with any other person for the sale *or disposition* of the merchandise, for any advances made by such other person upon the faith thereof.

485. But the statute of New York does not appear to have afforded complete security to the pledgee in good faith dealing with a factor; and it does not seem to be more than the first progressive step of departure from the rule of the Common law. Under the provisions of the statute alluded to, the pledgee is only protected against the claim of the true owner of the goods, if he had no knowledge that he was dealing with a factor. Thus, in a case decided by the Supreme Court of New York and quoted approvingly by the Supreme Court of the United States, it is said: "The obvious meaning is, that the factor or other agent who has been entrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property shall be deemed the true owner so far as may be necessary to protect those who have dealt with him upon the faith thereof, that is, upon the faith induced by the usual *indicia* of title, that he was the true owner of the property. The second section of the British statute, which

answers very nearly to the third section of our own, contains a proviso which expressly saves the rights of the true owner where the pledgee had notice that he was dealing with an agent; and our statute, though framed in a different manner, was evidently designed to produce the same result. It is impossible to suppose that the Legislature intended to enable the factor to commit a fraud upon his principal, by pledging or obtaining advances upon the goods for his own purposes, when the pledgee or person making the advances knew that he was not dealing with the true owner.”*

486. The statute purports to protect the pledgee who deals with a factor or other agent entrusted with the possession of any bill of lading or warehouse receipt for the delivery of merchandise, or with a factor or other agent, *not having the documentary evidence of title, but entrusted with the possession of any merchandise for the purpose of sale or as security for any advances to be made thereon*. But the court of New York has several times decided in construing this law that the factor or other agent must have come honestly to the possession of the goods of his principal in order that the pledgee should be protected, however innocent he might be of the fraud committed by the agent in obtaining the possession. In other words, the court held that the owner could

* *Stevens vs. Wilson* (1844), 6 Hill 512, 514.

Allen vs. St. Louis Bank, 120 U. S. 34.

Cartwright vs. Wilmerding, 24 N. Y. 534.

Howland et al. vs. Woodruff et al., 60 N. Y. 73.

not be said to have *entrusted* his agent with the possession of the goods when the agent had induced the principal by fraudulent means to place him in such possession and had defrauded him. It is equivalent to saying that he who commits a breach of trust had not been trusted. The converse is the logical proposition. He has not committed a breach of trust who was not trusted. The factor or agent, with the intention of defrauding his principal, and by means of false representations, induces him to put the goods in the agent's possession. How can it be said that the owner has not *entrusted* his agent with the possession of the goods? It is clear that he has done nothing else.

487. The State of Massachusetts has taken a more decided position in this matter, and its statute gives the pledgee dealing with a factor a more ample protection. Among other provisions on the subject, it enacts that, when a consignee or factor having possession of merchandise with authority to sell the same, or having possession of a bill of lading, permit, certificate, or order, for the delivery of merchandise, with like authority deposits or pledges such merchandise or any part thereof, or such document, with any other person as a security for money or merchandise advanced, or a negotiable instrument given by him upon the credit thereof, such other person, if he makes such loans, advances and exchanges, in good faith and with probable cause to believe that the agent, making the deposit or pledge, had authority so to do, and was

not acting fraudulently against the owner of such merchandise, shall acquire the same interest in, and authority over, such merchandise and documents as he would have acquired thereby if the agent had been the actual owner thereof, notwithstanding he had notice of such agency.*

488. But, where the pledgee knew that the factor was not authorized by his principal to pledge the goods, it has been held that he was not a holder for value and had no right against the true owner. In such a case, the statute does not protect the third person dealing with the factor.†

It was also decided that the pledgee receiving the goods from the factor in security of an antecedent debt of the latter was not a holder for value.‡

489. The State of Louisiana has retained the rule of the Common law, that the factor can not validly pledge the property of his principal without the latter's consent to secure the factor's debt. The jurisprudence of that State has carried the principle to its extreme limit, notwithstanding the efforts of its Legislature to change it. The latest decision on this subject declares in the words of Chancellor Kent, which it quotes, that: "Though a factor may *sell* and bind his principal, he can not pledge the goods as a security for his own debt, even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee, and his ignorance that the

* G. S. 1860, C. 34; P. S. 1882, C. 71.

† Goodwin vs. Loan Company, 152 Mass. 199.

‡ *Ibid.*

factor held the goods in the character of factor is no excuse. * * *

“ The doctrine that a factor can not pledge is sustained so strictly that it is admitted he can not do it by endorsement and delivery of the bill of lading any more than by delivery of the goods themselves. To pledge the goods of the principal is beyond the scope of the factor’s power; and every attempt to do it under the color of a sale is tortious and void.”*

490. The State of Louisiana is governed by the Civil law, which it has taken principally from the French law, and its Civil Code is very nearly a transcription from the Code Napoleon. But in all matters of Commercial law, in the absence of legislation, it follows the general American jurisprudence. This accounts for the fact that, in the case alluded to, the court rested its decision upon the Common law authorities.

491. It is curious, however, to observe in passing, on the subject of those two Civil Codes, that that of Louisiana contains numerous definitions, for which it has been criticised by law writers, and that the Code Napoleon, on the contrary, contains no definitions at all, for which it has been equally criticised.†

492. The court in the case just cited of *Lallande vs. His Creditors*, quotes also in support of its judgment an article on the Civil Code of Louisiana, which is

* 2 Kent, p. 626.

Lallande vs. His Creditors, 42 La. An. 710.

† *De St. Joseph*, *Concordance des Codes*.

more doctrinal than statutory, to-wit: "One person may pledge the property of another, provided it be with the express or tacit consent of the owner.

"But this tacit consent must be inferred from circumstances, so strong as to leave no doubt of the owner's intention; as if he were present at the making of the contract, or if he himself delivered to the creditor the thing pawned."*

493. Yet, as far back as in the year 1868, the Legislature of Louisiana has attempted to modify, at least, the Common law in its rigid rule, and to enable factors to pledge the property of their principals to a certain extent and under certain circumstances. A statute of that year provides: "That cotton press receipts given for any goods, wares, merchandise, grain, flour, or other produce or commodity stored or deposited with any cotton press, wharfinger, or other person, or any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company, may be transferred by endorsement therein, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour, or other produce or commodity therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons; but no property shall be delivered except on surrender and cancellation of said original receipt or bill of lading, of the endorsement of such delivery thereon in case

* Civil Code, Arts. 3145 and 3146.

of partial delivery. All cotton press receipts or bills of lading, however, which shall have the words 'Not Negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this section.

* * * *

"That all receipts, bills of lading, vouchers or other documents issued by any cotton press, wharfinger, forwarder, or other person, boat, vessel, railroad, transportation or transfer company, as by act provided, shall be *negotiable by endorsement in blank or by special endorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are.*"*

494. It would seem clear that the Legislature by that law intended to enable factors to pledge the goods in their possession, and to protect the pledgees against the true owner; but the Court, in the same case of *Lallande vs. His Creditors*, held that the bill of lading was not made to *Lallande*, or *order* or *assigns*, but to him alone, and that, therefore, he could not transfer it by endorsement. Whatever may be the merits of this ruling, the court does not stop at that principle, but strikes at the statute in full, and says: "But in any event, an endorsement of a bill of lading has not a like effect as the endorsement of bills and notes." And the court cites, in support of this principle, the case of *Shaw vs. Railroad Company*, 101 U. S. 557, in which the Supreme Court of the United

* Acts of 1868, p. 193.

States passing upon the statute of Missouri decided that bills of lading were not, under its provisions, negotiable like bills of exchange and promissory notes. The decision of the Supreme Court is no authority for that of the court of Louisiana. The statute of Missouri provides that: "Bills of lading shall be negotiable by written endorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." Passing upon this provision of the statute, the Supreme Court said: "If these (the consequences of full negotiability) were intended, surely the statute would have said something more than merely make them negotiable by endorsement. No statute is to be construed as altering the Common law farther than its words import. It is not to be construed as making any innovation upon the Common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it."*

495. These words of the Supreme Court militate against the ruling of the Court of Louisiana, because the statute of the latter State fairly expresses the intention of making the innovation upon the Common law. This statute says more than that of Missouri; it provides not only that bills of lading shall be negotiable *in the same manner* as bills of exchange and promissory notes, but shall be so *to the same extent* as

* Shaw vs. Railroad Company, 101 U. S. 565.

those negotiable instruments. The words *to the same extent* mean clearly *fully as negotiable* as bills of exchange and promissory notes. There is no ambiguity in those terms; they mean what they say. With the intention to render bills of lading as completely negotiable as any other negotiable instruments, the Legislature could not have used words more expressive of its will. And it is well to observe in that respect, that the first Missouri statute, of the year 1868, contained also the words *to the same extent*, but was amended by the statute of 1869, which repealed the section containing those words and rendered bills of lading negotiable only *in the same manner* as bills and notes. The statute of 1869 is the one passed upon by the Supreme Court of the United States in *Shaw vs. Railroad Company*. This case was decided in 1879. Later on, in the year 1886, the Supreme Court of the United States had again occasion to pass upon the Missouri statute of 1869, and held that the holder of a bill of lading, under its provisions, was not a holder for value if the endorsement on the bill was not *in writing*.*

496. Returning now to the statute of Louisiana of 1868, we may reasonably conclude that the question of the full negotiability of a bill of lading, and of the validity of the pledge by a factor, and of the rights of the pledgee in good faith against the true owner, is not settled by the decision in *Lallande vs. His Creditors*, because the judgment in that case rested

* *Allen vs. St. Louis Bank*, 120 U. S. 20.

upon the fact that the bill of lading was not made *to the order* of the consignee ; the other reasons in the decision being mere *dicta*, unsupported by authority.

497. This is the only statute of Louisiana which provides for the pledge of bills of lading by factors ; but there are other laws in that State, passed subsequently, which provide for the pledge of warehouse receipts by factors, a subject which has occupied both the Legislature and the courts very considerably, and which we have examined in a different chapter.

CHAPTER XLII.

PLEDGE BY THE FACTOR IN THE CIVIL LAW.

498. There is no distinction in the Civil law to be made between pledges by factors, depositories, common carriers, agents, trustees or other possessors of movable or personal property. The pledgee in good faith, for value, and without notice of adverse rights, is protected against the true owner. Such was the rule of the old commercial Common law of the few countries of continental Europe where commerce was already blooming when in England the nation was wasting its energies in civil or foreign wars, and trade was yet in its infancy. In Italy, which may be considered as the cradle of European commerce, when it emerged from the ignorance and barbarism of the Middle Ages, the principle of protection to the honest pledgee of goods pledged by a factor was soon recognized and firmly established as a rule of the Common law, based upon the necessities of trade. Casaregis, the early oracle of Commercial law in Italy, writing in the latter part of the sixteenth century, and citing the paramount authority of Cardinal Deluca, says with great positiveness :

“*Et similiter, ob eam rationem non turbandæ libertatis commercii, in dubitabilioribus terminis, nempe mercatoris, vel magistri navis, vel vectoris, mala fide alienantis, vel distrahentis, seu disponentis*

de rebus ut mercibus sui respective corresponsoris principalis contra illius mentem, seu ordines; quod alter mercator illorum emptor, seu acquisitor ex aliquo titulo oneroso, non tenetur domino illas restituere, nisi sibi persoluto tali pretio, firmat Cardinalis De-luca.”*

499. The principle and the reason of it are thus forcibly stated. The merchant who has given value for the goods fraudulently disposed of by an agent, in whatsoever quality the latter represents his principal, is not bound to surrender them to the owner unless the consideration he gave for them is returned to him. And this, because *the liberty of commerce must not be disturbed*.

500. Troplong, over two centuries later, himself the greatest expounder of the Civil law of pledge, says with emphasis, after quoting the words of Casaregis :

“ And, indeed, where would commerce be, when it is so necessary that its business should be rapidly gone through, when adverse claims disturb the entries made in the books of merchants, when negotiations once entered into can not be questioned without immense danger; where would commerce be if it were permitted to any one to come and pretend that such goods as have been sold, delivered, pledged, do not belong to the person who has disposed of them ? ” †

* Casaregis, *De credito*, Disc. 22. No. 19.

† Troplong, *Nantissement*, p. 77.

And he gives some striking instances, cited by Casaregis, of pledges by factors in which the pledgee was protected against the claim of the true owner.

One of these cases is that of Berzino and Minuti, merchants of Florence, who had received from Cavaglieri, a merchant of Ferrara, a consignment of silks, with instructions to sell them. Berzino and Minuti pledged the silks to Vanni, contrary to orders, to secure a loan of money they obtained from him for their own account. Later, Berzino and Minuti sold the silks to Chiavitelli, with the understanding that he should pay Vanni the amount of the loan. Berzino and Minuti subsequently went into bankruptcy, and Cavaglieri, the original owner of the silks, demanded that Chiavitelli should pay to him the price of the sale. Vanni opposed this demand, contending that his right as pledgee was superior to that of the owner.

Cavaglieri insisted upon his right of ownership, contending that his factors had no power to pledge his goods without his consent, and that he should be protected against the transferee *a non domino* of a thing fraudulently disposed of. The Court upheld the claim of Vanni, and decreed the validity of his pledge. This case is directly in point of the doctrine of the Civil Law that, even if the factor has no power to pledge the property of his principal without the latter's consent, the pledgee in good faith can not be disturbed by the owner.*

* Troplong, Nantissement, p. 75.
Ibid., pp. 72 and 78.

501. Troplong relates another instance of the same kind cited by Casaregis, and says that the latter extends the rule to all cases in which the third person is in good faith. Whether the possessor, guilty of breach of trust, is a ship's captain, a common carrier, a factor, an agent, an overseer, a depositary, a pledgee, is of no consequence. No doubt he has committed a breach of trust, but third persons should not be made to suffer. The owner must blame himself for having misplaced his confidence. Troplong gives also several cases in which the French courts applied the like rule in the early jurisprudence of France, though there had been at that time conflicting decisions on that subject.

502. There is no longer in France or in the countries which followed its legislation any doubt that the pledge made by the possessor of movable property to a third person without notice is valid against the true owner, whether the pledgeor is a factor or not and whether he acts against orders.

No doubt there may be fraud or abuse of authority in such cases, but innocent third persons should not be made to suffer for it. It is the *owner of the property who should bear the consequences of his own ill-placed confidence*. Such is the rule of the Civil law.*

503. It is only when the owner has not placed his confidence in an agent, but when his property has been stolen or been lost, that he can recover it from the vendee or pledgee in good faith. Then the principle

* Troplong, Nantissement, Sec. 77, p. 79; Sec. 73, p. 74.

that the possession of movables is equivalent to title does not prevail.*

504. Troplong concludes, after citing the law and the decisions in France, by these words: "Such is the Commercial law. Such is the jurisprudence. We see how much our Art. 2279 is favorable to the commercial interests. The harmony between the Civil law and the Commercial law is manifest here: one fortifies and enlightens itself by the other."†

Art. 2279 of the Code Napoleon is the one which consecrates the principle of the French law that the possession of movable or personal property is equivalent to title.

505. The Code of Commerce of France defines the factor as "one who acts *in his own name*, or under a firm name, for account of a principal."‡

Commenting upon the words of this article, *in his own name*, Mr. Rogron says that there is again there an essential difference between the ordinary agent and the factor: the factor acts *in his own name* for account of the principal, whilst the agent acts in the name of the principal. Celerity and secrecy, so necessary to the prosperity of commerce, demanded this modification of the common law. Third persons who deal with the factor, and to whom he is directly liable, are not in the necessity of losing their time to seek information of the persons for whom the factor

* Laurent, Nantissement, Sec. 441.

Pont, Nantissement, Sec. 1073, pp. 575, 576.

† Troplong, Nantissement, p. 79.

‡ Code de Commerce, Art. 94.

is acting, and the secret which those persons may wish to keep is thereby respected. It has been decided in consequence of this that the factor, authorized by his principal to act in his own name, is, for that very reason, invested with the right to dispose of the things which the principal has placed in his possession, and, for instance, *to pledge them*; in which case the principal has no right to inquire, so far as third persons are concerned, if the factor has disposed of the things conformably to his instructions. The principal, in eliminating himself, and showing the factor alone to the world, has renounced all claims against third persons, and for the same reason the third persons have no claims against the principal. The latter has any rights against the former, only if they have been in bad faith and knew that the factor was exceeding his authority and disposing of his principal's property in his own interest.*

506. The question presented itself again and squarely before the Court of Cassation in the year 1871, and was again emphatically decided in the sense that the pledgee in good faith is protected against the true owner, whose factor has fraudulently pledged the goods of his principal contrary to orders and for his own benefit. The case is that of the Bank of Martinique vs. Thomas and others, reported in the *Journal du Palais*, year 1871, p. 148.

The reporters of the case state the substance of the decision in these words: "But the question is com-

* Rogron, Code de Commerce, expliqué, p. 219.

plicated when the factor has disposed of things belonging to the principal. The latter would then be interested in opposing to third persons the restrictive conditions of the power of attorney which he has given, if the disposition of the property has been made against those conditions, if, for instance, the factor, instructed to sell the goods, has pledged them to secure a loan contracted in his own interest. But has the principal any right to oppose the terms of his mandate to third persons? The Court of Cassation proclaims with great energy, in this case, that, when the goods have been placed at the disposal of a factor by the endorsement of a bill of lading, or by actual delivery, the factor, authorized to act in his own name, may consent all kinds of alienation or conveyance which are consistent with the trade of such goods. He can act as owner, at least for an onerous consideration. He can do so validly in regard to third persons. If he exceeds his authority and violates the instructions he has received, he is responsible toward his principal; but the disposition of the property is effective in favor of third persons. In other words, the distinction which is made, in regard to the ordinary agent, between the unauthorized act from which third persons have to suffer, and the abuse of the mandate from which the principal must suffer, is not applicable to the factor who acts in his own name. The reason of it is evident: third persons have not got to concern themselves with the limits of a power of attorney which is not submitted to them. The

factor has all authority, because the act which empowers him remains entirely unknown to third persons. The omnipotence of the factor receives no other restriction, so far as third persons are concerned, than that which results from fraud and bad faith. The third person who would have connived with the factor to injure the principal, and would knowingly and fraudulently have profited by a violation of the restrictive instructions given to the factor, would be responsible toward the principal, and consequently could not avail himself of the transfer consented by the factor.*

507. We see, therefore, on one hand that the whole tendency of the Common law and of its jurisprudence is to protect the owner of personal property against even an honest transferee, whether vendee or pledgee, if the owner has been fraudulently deprived of his property by his agents. And we see, on the other hand, that the legislation and jurisprudence of the Civil law, on the contrary, are equally bent upon protecting the honest vendee or pledgee, without notice, even against the true owner of the property, who has been fraudulently deprived of it by his agent.

508. The reason of the Common law is twofold: first, it is, that nobody can transfer a right which he himself has not, or is not authorized by the owner to transfer; and, secondly, that the transferee must at his peril ascertain if the transferor is the true owner of the property or is authorized by the true owner to trans-

* *Journal du Palais*, 1871, p. 145.

fer it. If he does not ascertain this fact, he can only blame himself and must suffer in consequence. The vendee or pledgee takes the property at his peril, and must inquire as to the title before he takes it.

Both the law writers and the courts have proclaimed these principles with no little positiveness. Mr. Jones, quoting from adjudicated cases, says that at Common law a person in possession of goods can not confer on another, either by sale or by pledge, any better title than himself has.*

509. In a recent case in which a dishonest agent was in possession of goods by means of warehouse receipts taken in his own name, and pledged them to an innocent third person, the Court of New York said: "While mere possession of goods is frequently *prima facie* evidence of title, it is merely *prima facie*. Whoever deals with the possessor does it at his peril, and a purchaser from one having no other apparent title to goods than the possession thereof must see to it that the seller has the title; and if his title fails and he is obliged to respond to the true owner of the goods *his loss is due to his own misplaced confidence and not to that of the owner*. Owners of goods for commercial and other purposes must frequently entrust others with possession of them, and the affairs of men could not be conducted unless they could do so with safety."†

510. The Supreme Court of the United States, in

* Jones, on Pledge, Sec. 328.

† Soltau vs. Gerdau, 119 N. Y. 397.

the case of *Shaw vs. Railroad Company*, 101 U. S., p. 565, remarks that the law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession; and this protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

This shows and expresses the true spirit of the Common law on this subject, and confirms what we have just said, that the whole tendency of the Common law and its jurisprudence is to protect the owner of personal property, even against an innocent transferee, in direct opposition and full contrast to the Civil law.

511. But personal or movable property has no following or apparent title. *Mobilia non habent sequelam*. How is the ascertainment of the true ownership to be made? The questioning of a dishonest agent for information is desultory. If he is capable of defrauding his principal he is likely to deceive the third person. Then how can the pledgee or vendee of commercial effects or merchandise afford to consume any length of time in pursuit of the information, when commercial business demands immediate action? An all-important exception has been made to the rule of the Common law in favor of negotiable paper. A dishonest holder

of such paper transfers to a *bona fide* taker for value a right which he does not himself have. The true owner has no claim or right against this vendee or pledgee of his stolen or purloined property. Why? Because the necessities of commerce demanded it. The necessities of commerce, then, are the supreme law. The right of the true owner, sacred as it is, and protected as it is, must yield to the public interest. Is there not the same reason for bending the rigor of the Common law in the case of other commercial effects or merchandise? And ought not the pledgee who receives bills of lading, warehouse receipts, the representatives of personal commercial property, or the merchandise itself, from a factor, be equally protected, and the true owner equally sacrificed to the public interest? Do not the necessities of commerce demand this also? Clearly, they do. And hence the legislation in England and in some States of the Union which changed the Common law in that respect, and even made, or attempted to render bills of lading and warehouse receipts *negotiable in the same manner and to the same extent* as bills of exchange and promissory notes. Such legislation is evidently a stride, and a long stride, of progress, and is very likely to be followed in all commercial centres.

512. Judge Story, speaking of the inconvenience and harshness of the doctrine of the Common law, by which the pledge by the factor to an innocent third person is invalid, makes a very curious and interesting remark. He observes that the general denial of the

right to pledge by factors does not appear to have approved itself to the minds of Lord Eldon and Lord Ellenborough; and that it has been suggested by Mr. Bell, that *it probably had its origin in mistake*. Parliament, however, he says further, has at length interfered, and placed the doctrine on this subject upon a far more rational foundation than it was placed by the decisions of Westminster Hall. And, finally, he makes the following reflection, which is of a most significant import in the mouth of the great judge: "Considering the present state of the English law on this point, and the unsatisfactory principle on which the former doctrine rests, it would perhaps be a matter of regret if the American courts should feel themselves constrained, by the pressure of authority, to yield to it."*

513. The doctrine of the Common law was at first so absolute that it was even contended that factors could not validly pledge the negotiable paper of their principals, and that the claims of the true owner would defeat, in such cases, the rights of a holder for value. But this contention has been abandoned, and it is now established beyond dispute that the pledgee or transferee of negotiable paper in good faith is protected against the world, whether the transferrer is a fraudulent factor or any other purloiner of such property.

514. Chancellor Kent, who wrote before any of the innovations either in England or in this country had

* Story, on Bailments, Sees. 325 and 326.

been made to the Common law in relation to factors, and who, therefore, supported the old doctrine unreservedly, says, as to negotiable paper: "There is an exception to the rule in the case of negotiable paper, for their possession and property go together, and carry with them a disposing power. A factor may pledge the negotiable paper of his principal as security for his own debt, and it will bind the principal unless he can charge the party with notice of the fraud, or of want of title in the agent."*

515. It is true that the Common law will protect the innocent vendee or pledgee of personal property even against the true owner, if the latter has put the *indicia* of ownership upon the agent with whom the third person has dealt upon the faith of the *indicia*. But here we find a good deal of confusion in the decisions of the courts. What constitutes the *indicia* of ownership of personal property? It is often difficult to say. A bill of lading in the name of the factor is an *indiciu*m of ownership; and so is a warehouse receipt. Should any distinction be made between the owner of goods who puts the *indicia* of property upon his factor or agent and the one who enables the factor to put them on himself and thereby to deceive innocent parties? †

* Kent, Comm., Vol. 2, p. 627.
 Saloy vs. Bank, 39 La. An. 90.
 Givanovich vs. Bank, 26 La. An. 15.
 † Adams vs. Bowerman, 100 N. Y. 23.
 Parker vs. Baxter, 86 N. Y. 586.
 Barnard vs. Campbell, 58 N. Y. 73.
 Honold vs. Meyer, 36 La. An. 585.
 Baldwin vs. Ely, 9 How. 580.
 Crowley vs. Savings Bank, 34 La. An. 74.
 Am. and Eng. Ency. of Law, Vol. 18, p. 634

516. Nothing shows more strikingly the diversity of the human mind and the uncertainty of its wisdom than the fact that the Common law and the Civil law give the same reason, in the government of personal or movable property, for rules which are in direct opposition and conflict with each other. Says the Common law: The loss of the pledgee dealing with an unfaithful agent is due to his own misplaced confidence, and not to that of the owner. The affairs of men could not prosper unless they could with safety entrust their agents with their property for commercial purposes.*

The Civil law says: The loss of the owner whose property is fraudulently pledged by an agent is due to his own misplaced confidence. He can only blame himself. The honest pledgee must be protected, or credit would be destroyed, and commerce greatly obstructed and injured.†

517. The rule of the Civil law seems to be the more equitable, and its motive the more rational. It is the owner of the property and not the pledgee, who has misplaced his confidence if the factor proves dishonest. It is between the owner and the factor that the confidential relation exists, not between the factor and the pledgee, who is a third person in regard to the agency. Between the pledgee and the factor there is no confidential relation; the former reposes, or need repose, no confidence in the factor. He may

* *Soltau vs. Gerdau*, 119 N. Y. 397.

† *Troplong, loc. cit.*

not know that he is dealing with a factor, for the latter exhibits no credentials. If the pledgee is aware that the pledgeor is acting in the capacity of a factor, he has the right to presume that the latter is acting within the limits of his authority and he should not suffer because a mandate which is not submitted to him has been violated. As stated by Mr. Rogron, the principal by eliminating himself and showing the factor alone to the world as possessor of the property, has renounced all claims against third persons; and, for the same reason, third persons have no claims against the principal for the acts of his factor.

The owner is presumed to know the factor to whom he confides his property and to have ascertained whether or not that agent is worthy of his confidence. The pledgee and the factor are strangers to each other and meet only for the purpose of bargaining in a commercial transaction. The owner deals with one factor alone. The pledgee deals with any number of factors. The owner looks to the character of the factor. The pledgee looks to the quality of the property.

The factor commits a breach of trust if he disposes fraudulently of the property entrusted to him and may be prosecuted for it. He commits no breach of trust in deceiving the pledgee by transferring to him property which he has no right to transfer.

518. And now, which of the two laws is more likely to obstruct and impede commerce; the one which permits commercial men to buy commercial

property or take it on pledge, with safety from the parties in whose hands it is found, and who apparently are the owners of it; or the one which exposes purchasers to danger and loss if they deal with parties whom they do not know with absolute certainty to be the true owners of the goods which they offer for sale or pledge, or the duly authorized agents of the true owners? The one rule naturally creates confidence, and consequently multiplies commercial relations and business transactions; the other rule, as naturally, is bound to create distrust, and, as consequently, is likely to restrict commercial and financial operations. We believe that, both as a principle of justice and a matter of public interest, the Civil law is superior on this subject to the Common law.

CHAPTER XLIII.

LIENS AT COMMON LAW AND TACIT PLEDGES OF THE CIVIL LAW.

518. These two subjects, though not identical, at least present many points of analogy and even of affinity between them. In both of them the creditor has a right of priority and preference over the proceeds of the security, and this right rests upon his possession of the thing pledged or affected by the lien. In both of them the pledge or the lien is lost if the creditor parts with that possession. In neither of them the creditor has any right in the thing, or to the thing, *in re* or *ad rem*. In neither of them the creditor has any right, general or special, of property. As to the tacit pledge of the Civil law, no legal title, not even a special or qualified property, passes to the pledgee, because the theory or doctrine of such titles is unknown and repulsive to the Civil law. And as to the liens at Common law, it is well established that the general title which passes to the mortgagee, and possibly the special title, which passes to the pledgee when the thing pledged is assigned or transferred to him; it is well established, we say, that no such title, and no title at all, passes to the lien creditor.

519. In many instances the same thing which, at Civil law, is termed a tacit pledge, at Common law is called a lien, such as the right of priority or pref-

erence and power of retention given by the law to a workman over the article which he has repaired, for the price of his labor ; to an innkeeper over the effects of a traveler for the price of his board or lodging ; to the lessor over the furniture or chattels of the lessee for the rent ; to the factor for his advances over the goods of his principal ; to the common carrier for his freight over the merchandise which he carries, and so forth.

Properly speaking, the pledge is only conventional or contractual ; it is a contract by which the pledgor puts the thing pledged in the hands of the pledgee to secure an indebtedness according to certain terms and conditions agreed upon between them. Under the rules of the Civil law this contract, except in the case of commercial pledges, must be clothed with some indispensable formalities and evidenced by a written act.

520. The denomination of tacit pledge, therefore, to designate the lien or right of preference and retention of the credit under certain circumstances, is hardly a correct one. Still less so is the term *statutory* pledge sometimes used by the courts and the law writers. The law permits parties to contract with one another, but it does not contract for them. It does not therefore itself *pledge* the property of the debtor to the creditor. It only submits it to the power of the latter, in certain cases and for certain purposes ; and that is precisely what constitutes the lien at Common law.

521. The *privileges* of the Civil law (*privilegia*

of the Roman law) are a totally different thing, though in the jurisprudence and the practice of Louisiana, the two words—lien and privilege—are used indifferently to mean the same thing. The *privileges* of the Civil law correspond to ~~the~~ *equitable liens* of the Common law to a certain extent, and differ from them in many respects, as we will see later on.

522. Mr. Jones says that there may be a statutory pledge in the same way that there may be a statutory mortgage, and he illustrates his idea in the following words: "Thus a statute which provides that a railroad company, which is to receive bonds of a city to aid its construction, shall issue to the city certificates of stock of the company for an amount equal to the amount of the bonds received, and that the stock should remain forever pledged for the redemption of the bonds, creates a pledge of the stock to the city." And he cites the case of *United States vs. New Orleans*, 98 U. S. 381.*

But this is clearly not a statutory pledge. The statute in that case authorized the city of New Orleans to subscribe to the capital stock of the railroad company, and, to that effect, to issue its bonds, on condition that an amount of stock equal to the amount of bonds issued should be delivered and pledged by the company to the city. The authorization to issue the bonds was statutory, but the pledge

* Jones, on Pledges, Sec. 22.

of the stock was conventional, though the law made it a condition to the issuing of the bonds.

A statute authorizing the Governor of a State to issue bonds in aid of a bank, and providing that all the mortgages belonging to the bank should constitute a pledge in favor of the State and of the bondholders, to secure the payment of the bonds, presents a similar instance of the statutory authorization to issue the bonds and of the contractual pledge to secure the same.*

523. A law authorizing a married woman, under certain circumstances and conditions, to borrow money and mortgage her property to secure the debt, is of the same kind. The authorization to borrow is statutory, but the mortgage is conventional.†

In fact, I doubt that there is, properly speaking, such a thing in the legislation of either Civil or Common law countries, as *statutory* pledges. If the pledge is statutory because it is made under a statute which permits it, the same may be said of all pledges in the Civil law, as they are allowed by virtue of statutory provisions. But the Roman law and the modern Civil law as well see a tacit pledge in certain contracts, as inherent in the same, in which the law gives to the creditor the right of *retention* of the thing over which he has a lien and of which he has the possession. The contracting parties in such cases are presumed to have

* Forstall vs. Consolidated Association, 34 La. An. 770.

Citizens Bank of Louisiana vs. Cotton Press Co., 7 La. An. 286.

Same vs. Heirs of Gray, 47 La. An. 551.

† Civil Code of Louisiana, Arts. 126, 127, 128.

tacitly agreed as to the existence of the pledge, having contracted under a law which gives the creditor the right of retaining possession of the debtor's property.

524. I will, for the understanding of this subject, again follow Mr. Troplong. He tells us that the Civil Code provides only for the conventional pledge; but that there is a tacit pledge in numerous transactions. For instance, in the contract of lease. The fruits of the crop and the furniture and instruments of husbandry in the rented house or farm are a tacit pledge, inherent in the contract of lease, and give the lessor the right to be paid by preference from the proceeds of those things. It is as a tacit pledge that the right of the landlord is considered by the Roman law. And Troplong cites the Digest: "*Eo jure utimur ut quæ in prædia urbana inducta illata sunt, pignori esse credantur, quasi id tacite convenierit.*" This conclusion, he adds, is natural. The things in question are contained in the leased premises; the lessor, therefore, detains them in some sort in detaining and possessing the premises which contain them.*

525. The Civil Code of Louisiana provides more explicitly for the right of pledge of the lessor than the Code Napoleon, and under the terms of the former the pledge can hardly be said to be merely tacit.

The Code of Louisiana enacts on that subject as follows:

Article 2705. "The lessor has for the payment of his rent, and other obligations of the lease, a right of

* Troplong, Nantissement, Sec. 40.

pledge on the movable effects of the lessee which are found on the property leased.

“ In the case of predial estates this right embraces everything that serves for the labor of the farm, the furniture of the lessee’s house and the fruits produced during the lease of the land ; and in the case of houses and other edifices it includes the furniture of the lessee and the merchandise contained in the house or apartment, if it be a store or shop.

“ But the lessee shall be entitled to retain out of the property subjected by law to the lessor’s privilege, his clothes and linen and those of his wife and family, his bed, bedding and bedstead and those of his wife and family ; his arms, military accoutrements, and the tools and instruments necessary for the exercise of the trade or profession by which he gains his living and that of his family.”

Article 2706. “ This right of pledge includes not only the effects of the principal lessee or tenant, but those of the under-tenant, so far as the latter is indebted to the principal lessee at the time when the proprietor chooses to exercise his right. A payment made in anticipation by the under-tenant to his principal does not release him from the owner’s claim.”

Article 2707. “ This right of pledge affects not only the movables of the lessee and under-lessee, but also those belonging to third persons, when their goods are contained in the house or store, by their own consent, express or implied ” *

* *Publishing Company vs. Piffet et als.*, 34 La. An. 602.
Goodrich vs. Bodley, 35 La. An. 525.

Article 2708. "Movables are not subject to this right, when they are only transiently or accidentally in the house, store or shop, such as the baggage of a traveler in an inn, merchandise sent to a workman to be made up or repaired, and effects lodged in the store of an auctioneer to be sold."

Article 2709. "In the exercise of this right the lessor may seize the objects, which are subject to it, before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified."

And Article 3218 provides for the right of retention of the lessor. "The right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than a mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid.

This right of the lessor to take the effects of the lessee and retain them until he is paid, corresponds, in a certain manner, to the law of Distress of the old Common law of England and to the statutory law of some of the States of the Union on the same subject. Of that we shall see more further on.

526. The Code Napoleon does not contain provisions similar to those of Louisiana, and it treats the lessor's right over the property of the lessee as a mere

privilege or lien ; but it gives the lessor the power to seize the property of the lessee for rent by a proceeding called *saisie-gagerie*, and it gives him also the right of revendication of that property within a certain number of days, that is, to follow it in the hands of third persons and seize it there when the lessor has removed it from the leased premises.*

527. The framers of the Code of Louisiana have evidently taken the substance of the articles cited above, except the exemption of the tools and other effects, from Pothier, the source of legal wisdom and learning from which they principally drew their provisions, when they departed from their ordinary model, the Code Napoleon. But we must observe that Pothier, who preceded the Code Napoleon and adhered more closely to the Roman law than did the framers of the French code, calls the tacit pledge of the landlord over the lessee's property a tacit mortgage, *une hypothèque tacite*. Pothier uses this term as he finds it in the Roman law, where the mortgage affected personal as well as real property. Furthermore, as we have seen before, the distinction between the pledge and the mortgage in the Roman law was often ignored, the only difference being in fact that the pledgee had possession of the property, and the mortgagee had not.

We find, therefore, from the Roman law, from Pothier, from Troplong, that the right of priority of

* Code Napoleon, Art. 2102.

the lessor over the lessee's property for the rent arises from a tacit or implied pledge.*

528. Let us observe, on the lessor's privilege, a remarkable difference between the jurisprudence of Louisiana and the French law, from which it is derived, as to the kind of property of the lessee upon which the privilege rests. Pothier and the commentators of the Code Napoleon are unanimously of the opinion that the choses in action, bills and promissory notes which are found on the leased premises are not affected by the lessor's privilege.

Pothier says: "In regard to promissory notes and obligations which are found in the house, it is not doubtful that they are not subject to the pledge of the landlord, for they are only evidences of credits belonging to the lessee; and those credits being incorporeal things which, by their nature *nullo continentur loco*, it can not be said that they *furnish* the house."†

Pont says in the same manner: "Evidences of credits and obligations, being incorporeal things, *quæ in solo jure consistunt*, reside, in reality, in no place, *nullo circumscribuntur loco*. Hence we must conclude that it would be folly to consider that they *furnish* the leased premises."‡

The Court of Louisiana has decided differently, and held that promissory notes, bills of exchange and

* Pothier, Du Louage, p. 197.

† Pothier, Du Louage, p. 203, No. 45.

‡ Pont, Des Privileges, 1 Vol., p. 79.

See also: Troplong, Des Privileges, 1 Vol. 221, 222; Laurent, Des Privileges, Vol. 29, p. 448, No. 413; Aubry et Rau, Vol. III, p. 139, Sec. 261.

choses in action generally were part of the *movable effects* of the lessee upon which the privilege and pledge of the lessor was established by law.*

I think that we may say of those decisions of the Court of Louisiana what Mr. Bell says in his Commentaries, speaking of the early English decisions on the right of factors' right to pledge their principal's property, that they probably *had their origin in mistake*.†

529. The right of the lessor to retain or detain the property of the lessee until the rent is paid being considered a tacit pledge, and yet there being between the parties no written act of pledge, as required by the Civil law, it is well to see what Troplong says on this point. He remarks that the formalities required by the article of the Napoleon Code (2074) are only indispensable when there is a contract of pledge entered into as a principal matter. But if the pledge is only the necessary and accessory consequence of another contract, which includes it impliedly, a strict and rigorous application of Art. 2074 is not demanded. He gives as an example the contract of lease. The right of pledge that the lessor has on the property deposited in the leased premises does not result from the principal clauses of the contract; it is implied in the lease. Thus, it has been seen that the landlord can seize the goods deposited with the lessee, even by

* Succession of Stone, 31 La. An. 311.

Matthew & Finley vs. Their Creditors, 10 La. An. 718.

† Story, Bailments, 325.

virtue of a verbal lease. And the same thing may be said of a workman or artisan who would seize the article repaired by him, of the factor in possession of goods which he holds for sale, etc. All these are in the same position when they have in their hands the property of their debtor, as if they had stipulated a regular pledge of it.*

The idea of a tacit pledge is expressed also by Cujacius in the case of the common carrier over the goods in his possession. He says: "*Merces pro vectura tacite pignoratæ sunt.*" †

And again, as to the law of Louisiana, the rights of those privileged creditors can not altogether be said to arise from a tacit or implied pledge, because their privilege is declared by the statute. Thus, of the depositary who has incurred any expenses for the preservation of the thing deposited, it is said: "Against the owner of the thing his right is in the nature of that of pledge, by virtue of which he may retain the thing until the expenses which he has incurred are repaid. He possesses this qualified right of pledge against the creditors of the owner if they seek to have the thing sold. He may refuse to restore it unless they either refund his advance or give him security that the thing shall fetch a sufficient price for that purpose." ‡

530. For the innkeeper, the law of the same State provides: "Innkeepers have a privilege, or more

* Troplong, *Des Privileges*, Vol. 1, p. 259.

† Troplong, *Du Nantissement*, p. 42.

‡ Civil Code of Louisiana, Art. 3225.

properly a right of pledge, on the property of travelers who take their board or lodging with them, by virtue of which they may retain the property and have it sold, to obtain payment of what such travelers may sue them on either of the accounts above mentioned.*

531. There is also a tacit pledge recognized by the Civilians as resulting in favor of the creditor from the judicial seizure of the property of the debtor. That seizure, which is made in spite of the debtor, and puts his property in the hands of justice, for account of the creditor, operates as a compulsory pledge, known to the Romans as the *pignus coactivum*. The law, through its judicial officers, enters the premises of the debtor, takes possession of his personal property for the benefit of the creditor, and after dispossessing the debtor, constitutes a legal pledge of it. In this, the law protects both the creditor and the debtor. It takes charge of the rights of the former, and it saves the latter from personal violence and rigor.†

This tacit pledge and privilege of the seizing creditor is provided for by the legislation of Louisiana, and it is established both in cases of seizure in execution of judgments, and of seizure by mesne process of attachment. • The creditor, by the mere act of seizure, is invested with a privilege on the movable and immovable property thus seized, which

* Civil Code of Louisiana, Art. 3233.

Laws of 1896, Nos. 29, 35, 28.

† Troplong, Du Nantissement, No. 46.

entitles him to a preference over other creditors, unless the debtor has become bankrupt previous to the seizure.”*

It is the mere act of seizure, equally, in attachments which creates the right of priority, as the Court has declared: “An attachment enables the creditor to obtain payment out of the property attached in preference to others, not on the ground that he has acquired a lien upon it, but because he has first used the process of the Court to seize and put it into the possession of the sheriff for the purpose of obtaining his payment. The law and the courts will not, therefore, allow other ordinary creditors or other process to interfere with him.”†

532. But it is only the possession, actual and corporeal, or constructive or symbolical, which the sheriff takes of the debtor's property, which gives the creditor the right of preference, that possession being considered as the tacit compulsory pledge, the *pignus coactivum*. Therefore, when the attachment is dissolved before the sale of the property seized by the bankruptcy of the debtor, or for some other reason, the possession of the sheriff ceases, the compulsory pledge is defeated and the creditor loses his right of preference.‡

* Code of Practice, Art. 722.

† Beck & Co. vs. Brady *et al.*, 6 La. An. 445.

‡ Nelson & Co. vs. Simpson, 9 La. An. 311.

Hanna vs. Creditors, 12 La. M. 32.

Edson vs. Freret, 11 La. An. 710.

Stockton vs. Hyde, 5 La. An. 300.

Tua vs. Carriere, 117 U. S. 201.

Peck vs. Jenness, 7 How. (U. S.) 612.

CHAPTER XLIV.

533. The same right of preference of the seizing creditor arising from the fact of the seizure itself, and which the Civilians call a tacit pledge, exists in the same manner in the Common law as a lien at law, with the same advantages and under the same conditions. As the *pignus coactivum*, this lien at law springs into existence by the possession of the sheriff or other executive officer of the court, and goes out of existence if that possession ceases before the sale of the property seized. By statute in some States the mere putting of the writ of seizure into the hands of the sheriff amounts to a constructive possession of the debtor's property and operates as the question at law in question.

The seizure creates the lien, whether it is in execution of judgments or by mesne process of attachment.*

In Louisiana and other Civil law countries the seizure of credits is only effected by the notice given by the sheriff to the *debtor of the credit*, not to the debtor or defendant in the suit. It is this notice to the debtor of the credit which constitutes the constructive possession of the credit. †

* Poche vs. James, 7 How. 612.
Waller vs. Best, 3 How. 111.
Kittridge vs. Warren, 14 N. Hamp. 509.
Arnold vs. Brown, 24 Pick. 95.
Drake, on Attachment, Sec. 224.

† *Ante*: Sec. 11 *et seq.*

In the United States and in England the seizure is effected as a transfer or assignment of the credit would be, without such notice. *

534 This doctrine or theory of the tacit pledge is the product of the philosophy and ingenuity of the Roman jurists. It is unknown to the Common law, at least under that name. But the same principles and rules which govern it are to be found in the liens at law of the American and English jurisprudence.

In the lien at law, as in the tacit pledge, the property upon which it bears must be in the possession of the creditor; but it is not the fact of possession which creates the right of preference, though the right is inseparable from possession. That right arises from the nature of the creditor's claim and is created by or under the law. The fact of possession supports, vivifies and preserves the right, and is a condition precedent of its very existence. Thus it is the law that gives the lien, or right of preference, to the lessor, the artisan, the innkeeper, the common carrier, etc.; but it is possession that makes the lien available. Without possession the preference would not exist; but possession itself, where the law, or the parties under the law, have created no lien, would be no cause of preference.

The lien is a right *over* the property, when it is in the hands of the creditor. It is not a right in the thing or to it, *in re* or *ad rem*, as we said before. It is not inherent in it in any manner, as in the mort-

* *Ante*: Sec. 19 *et seq.*

gage. And when we say that it is a right *over* the property we mean over the proceeds of it when it is sold and the price realized. The word *lien* expresses clearly what it is, and it is remarkable that the law writers have not thought proper to give the origin of it. The term is taken from the French word *lien*, which means a *lie*, that which attaches something to something else. The lien, in law, is the tie which attaches the property to the claim of the creditor, or the claim to the property.

535. At the same time that we assimilate the lien at law with the tacit pledge, we should bear in mind that the latter is one of the fewer privileges of the Civil law depending upon possession, but that generally the privileges of the Civil law are not accompanied by possession, and have been created by the Roman law for the very purpose of securing the creditor without depriving the debtor of his property, at least until the debt becomes executory and the property is seized and sold to satisfy the debt. It is one of the characteristics of the Civil law privileges, when possession is not necessary to their existence, that they follow the property into the hands of third persons, like the mortgage, and it is that which makes them effective as a means of preference over other or ordinary creditors.

536. There is also this difference between the liens at law of the Common law and the tacit pledges of the Civil law, that, though they produce the same effects, and both necessitate the creditor's possession of the debtor's property, the sources of their existence

are not the same. The tacit pledges result from privileges established in favor of the creditors. Now, the privileges of the Civil law are all created by statute, and they are of *stricti juris*. They can not arise from contract, or from usage or custom, or by implication of law. There are, therefore, no privileges at Common law in the Civil law countries. Whether they exist with or without the creditor's possession of the property they are the creatures of statutory law. The contracting parties have no power to grant, on one side, and to accept, on the other, a privilege on the property of the debtor in favor of the creditor, as is done in case of a mortgage. Any stipulation of that sort is absolutely nugatory and produces no legal effect whatever. The Civil Code of Louisiana states the rule in these words: "Privilege can be claimed only for those debts to which it is expressly granted in this Code."*

In his work on Privileges and Mortgages, Mr. Pont, the continuator of Marcadé, the celebrated commentator of the Code Napoleon, expounds the law on this subject as follows: "We must even say, again with Domat, that, if the debt is not by itself privileged, it can not be rendered such by means of an agreement. The Court of Cassation has precisely decided in this sense that all privileges must be restricted to

* Civil Code of Louisiana, Art. 3185.
Succession of Rousseau, 23 La. An. 3.
Hoss *et al.* vs. Williams, 24 La. An. 568.
Gause vs. Ballard, 16 La. An. 107.
Citizens Bank vs. Maureau, 37 La. An. 857.
State vs. Bank, 33 La. An. 705.

the cases expressly specified in the statutes which have established them.”*

537. The liens at law, on the contrary, in the system of the Common law of England and of the States of the Union, excepting Louisiana, are formed by, or arise from, either a stipulation or contract between the creditor and debtor, or usage or custom of trade, or implication of law, or statute. And, in case of specific or particular liens, which means liens on a particular piece of property to secure a particular debt. they are liberally construed in favor of the creditor. The personal liens, on the contrary, founded on custom to satisfy a general balance of accounts, are not favored, and are looked at with jealousy and strictly construed.†

538. But, although springing from different sources, the liens at law and the tacit pledges have analogous purposes and effects and cover the same classes of claims. For instance, the workman or artisan has the same right under the Civil law and the Common law to detain in his hands until his claim is satisfied the property of the debtor that he has repaired, or improved, or constructed. This right is founded in the Common law upon the lien at law, whether established by agreement, custom or statute; and it is founded in the Civil law upon the

* Pont, *Des Privileges*, Vol. I. p. 17.

Court of Cassation, 18th May, 1831; 12th December, 1831; 3d August, 1837.

† Kent, *Comm.*, Vol. 2, pp. 634, 635, 636, 637.

Am. and Eng. Ency. of Law, Vol. 13, p. 576.

tacit pledge and privilege exclusively created by statute. *

The same thing may be said of the liens at law and tacit pledges, with power of retention, which secures the rights of the innkeeper for boarding and lodging on the effects of travelers; of the factors for advances on the goods or funds of their principals in their hands; of the common carriers for their freight on the merchandise in their possession; of the attorneys at law on the amount recovered for their clients; of the lessor for his rent on the property of the lessee placed on the leased premises.

The purposes, the instrumentalities and the effects of the Common law and the Civil law in all such cases are the same. The purpose is to specially protect the creditor; the instrumentality is the power given to him to retain the property of the debtor until he is paid; the effect is the security of his debt thereby obtained by him.

539. In both systems of the Common law and the Civil law, the lessor's right of possession and detention of the lessee's property for the security of the rent is highly protected, and harsh means of obtaining payment are put in the hands of the creditor. But those means differ in their mode of execution, though they

* Story, Bailments, Sec. 440.

Kent, Comm., Vol. 2, p. 634.

Am. and Eng. Ency. of Law, Vol. 13, p. 590.

Civil Code of Louisiana, Art. 3217, No. 2.

Pothier, Procédure Civile, p. 197.

Troplong, Des Privilèges, Vol. —, Nos. 176, 177.

Gayarré vs. Tunnard, 9 La. An. 254.

Fields vs. Creditors, 11 La. An. 545.

are analogous in substance. By the Common law of Distress, the landlord has the right on default of payment of rent to enter the leased premises and take hold of whatever property is distrainable. He may act in person or by an agent, and in either case he has the sanction of the law, but not the official aid of the courts, if he does not seek it. If he employs a constable to act for him, the latter is his private agent, but not the officer of the court. After the required notices and formalities, the distrained property is sold without order or decree of court. It may be said that the law in that case allows the lessor to take the law in his own hands to a certain extent. It is true that in several States the Common law of Distress has been considerably amended and restricted, if not altogether abolished. It has become in a great measure unpopular in this country, as giving the landlord an undue advantage over the other creditors of the lessee, and enabling him to act with too much severity against the latter. In some States the mesne process of attachment has been substituted to the power of Distress of the Common law, thereby placing the rights of both the lessor and the lessee in the hands of justice.*

540. Under the Civil law, the right of retention of the lessee's property by the lessor, for the payment of rent, does not go the extent of enabling or allowing him to enter, in person or through an agent, on the leased premises, *vi et armis*, and take hold of the

* Am. and Eng. Ency. of Law, Vol. 5. pp. 506 *et seq.*
Bouvier, Law Dictionary, *verbo* Distress.

things upon which his privilege bears, and sell them without an order or decree of court. He must invoke the aid of the law for that purpose, and act through its officers. When the Code Napoleon says that the lessor can *seize* the property of the lessee for rent it means that he can *cause it to be seized* by a judicial proceeding. And when the Civil Code of Louisiana says that the lessor may *take the effects of the lessee and retain them until he is paid*, it means that he can have them seized and taken hold of for his account by the sheriff or other officer of the court. Neither article of either Code would be a legal warrant or authority for the lessor to take the law into his own hands against a defaulting lessee, and enter his premises and take, in person, possession of his property. The right of taking and retaining the effects of the lessee is clearly a right to be exercised through the ministry of justice.

541. In Louisiana the lessor causes the property of the lessee upon which he has the privilege for his rent, to be seized by means of the writ of provisional seizure, for which the Code of Practice provides specifically as follows: "When a lessor sues for rent, whether the same be due or not, he may obtain the provisional seizure of such furniture or property as may be found in the house or attached to the land leased by him; and in all cases it shall be sufficient to entitle a lessor to said writ to swear to the amount which he claims, whether due or not due, and that he has good reasons to believe that said lessee will

remove the furniture or property on which he has a lien or privilege, out of the premises, and that he may be thereby deprived of his lien; provided, that in case the rent be paid when it falls due the costs of seizure shall be paid by the lessor, unless he prove that the lessee did actually remove, or attempt or intend to remove, the property out of the premises; provided, that in all cases of provisional seizure of furniture or other property at the instance of lessors, the lessee shall be permitted to have the seizure released upon executing a forthcoming bond or obligation, with a good, solvent security for the value of the property to be left in his possession, or for the amount of the claim, with interest and costs; provided, further, that the value of the property shall be fixed by the sheriff or one of his deputies, with the assistance of two appraisers selected by the parties, twenty-four hours' notice being previously given to the lessor or his counsel to select an appraiser.”*

The provisions of this law show clearly that the landlord can not himself and without the aid of justice take hold of the property of the lessee. Furthermore, it has been several times decided that the right of the lessor to retain the effects upon which he has his lien *until his rent is paid*, is only good against the lessee, but can not avail the lessor against third persons.†

The Court of Louisiana has, however, said on sev-

* Code of Practice of Louisiana, Art. 287.

† Case vs. Kloppenburg, 27 La. An. 482.

Pickens vs. Sheriff, 31 La. An. 870.

eral occasions that the landlord had the right, in the very words of the law, *to take and retain* the lessee's property; but the fact of actual and forcible taking of possession by the landlord himself without legal proceedings was not a factor in those cases. *

It has been decided, under this law, by the Court of Louisiana, that the mere fact that the lessee was in default of payment of the rent was a sufficient cause or reason for the lessor to swear, for the purpose of the seizure, that he had good reasons to believe that the lessee will remove his property from the leased premises and defeat the privilege or lien. †

542. But, as we have seen, the law of that State exempts from even the lessor's lien the lessee's clothes and linen, and those of his wife and family, his bed, bedding and bedstead, and those of his wife and family: his arms, military accoutrements and the tools and instruments necessary for the exercise of his trade or profession by which he gains his living and that of his family. ‡

It is to be noted that the exemptions from seizure for debt other than the rent under the lessor's lien are carried still further by the later law of Louisiana, and carried to an extent which borders on the ridiculous if not on injustice. By an act of its Legislature, 1876, amending the Code of Practice, it is provided that:

* Cooper vs. Capel, 29 La. An. 213.

Arick vs. Walsh, 23 La. An. 605.

Robb vs. Wagner, 5 La. An. 112.

† Dillon vs. Poirier, 34 La. An. 1100.

Schiff vs. Ezekiel, 23 La. An. 383.

Lalaurie vs. Woods, 8 La. An. 366.

‡ Civil Code of Louisiana. Art. 2705.

“The sheriff or constable can not seize the linen and clothes belonging to the debtor or his wife, nor his bed, bedding or bedstead, nor those of his family, nor his arms and military accoutrements, nor the tools and instruments and books and sewing machines necessary for the exercise of his or her calling, trade or profession by which he or she makes a living; nor shall he in any case seize the rights of personal servitude, of use and habitation, of usufruct to the estate of a minor child, nor the income of dotal property, nor money due for the salary of an officer, nor laborers’ wages, nor the cooking stove and utensils of said stove, nor the plates, dishes, knives and forks and spoons, nor the dining table and dining chairs, nor wash tubs, nor smoothing irons and ironing furnaces, nor family portraits belonging to the debtor, *nor the musical instruments played on or practiced on by any member of the family.*”

And it took a decision of the Supreme Court of the State to say that the act of 1876 did not apply to the lessor’s lien. *

Between the humane law which saves the clothes and bed of the poor debtor and his tools from the reach of a grasping creditor, and the *communistic* enactment which guards his musical instruments, possibly of great value, against seizure for an honest debt, there is a wide margin. Such principles, if they are principles, do not do honor to American legislation.

* Stewart vs. Lacombe, 30 La. An. 159.

In most of the States the law exempts from distress certain chattels of the lessee, such as his tools, some instruments of husbandry, cattle of a certain denomination and used for certain purposes, all of which are necessary for the livelihood of the lessee and his family. *

We have seen before, that exemptions of the same kind from seizure were provided for by the Roman law and the early laws of France. †

The present French Code of Procedure contains also provisions of the same nature. ‡

* Am. and Eng. Ency. of Law, Vol. 5, p. 709.

† *Ante*, p. 2.

‡ Code de Procédure Civile, Art. 592.

CHAPTER XLV.

EQUITABLE LIENS OF THE COMMON LAW.

PRIVILEGES OF THE CIVIL LAW.

543. We have seen the great analogy between the liens at Common law and the tacit pledges of the Civil law. We propose now to look into the double subject of the Equitable liens of the Common law and the Privileges of the Civil law. There are between the two subjects some points of great similarity and others of fundamental difference.

The first point of similarity is that, in either case, the creditor has neither possession nor any right of property, but only a right of preference over the property, or rather the proceeds of the debtor's property. But, as in the case of the mortgage, this right of preference attaches itself to the property and follows it into the hands of third persons: hence the means of rendering the preference effective. When, in two different systems of law, governing different countries, we find the creditor, in analogous cases, given the same preference and the same means of effecting that preference over other creditors of the same debtor, the similarity necessarily strikes us and we are disposed to conclude that the two systems in that respect, at least, must have a common origin. Although the principles of right, justice and morality are the same everywhere, rules of law which are

merely arbitrary do not frequently coincide in different countries. The Equitable Liens of the Common law of England have their source in the Roman law, so far, at least, as their fundamental principles are concerned.

544. In his learned explanation of the Equitable Liens, Mr. Pomeroy, who seems to have expounded this subject more fully and more clearly than any of the previous writers, says in a note which we take pleasure in transcribing here, and which should have occupied a more conspicuous position in his work :

“The equitable lien is strictly analogous to and is undoubtedly derived from the *hypotheca* of the Roman law. *Hypotheca* was the right given to a creditor over a thing belonging to another, in order to secure the payment of a debt while the property and possession remained in the debtor. It was thus distinguished from *pignus*, in which the possession was delivered to the creditor, and he thus acquired a special *property*. *Hypotheca* was generally created by agreement, expressed or implied, between the parties ; but in some cases it was created by operation of law, and then called *hypotheca tacita*, as over the property of a tutor in favor of his ward and in favor of a wife over her dowry in the hands of the husband.”*

545. The Equitable Liens of the Common law are, indeed, derived from the Roman law, as most of the equity jurisprudence of England comes from the Civil law. We may go still farther and repeat the words

* Pomeroy, Equity Jurisprudence, Vol. 3, p. 230, note 3.

of Sir William Jones, one of England's great lawyers: "With all its imperfections, the Digest is a most valuable mine of judicial knowledge. It gives law at this hour to the greatest part of Europe, and, though few English lawyers dare make such an acknowledgment, it is the true source of nearly all our English laws that are not of feudal origin."*

546. England took from the *hypotheca* of the Romans the principles of its Equitable Liens, as the Romans themselves took the *hypotheca* from the Greeks, because it was the only mode of security then known between debtors and creditors by which both the title or ownership and the possession remained with the debtor. The *hypotheca*, or mortgage of the Civil law, by which name it was adopted in Rome and is still known, and in force in the modern countries of Latin origin, did not deprive the debtor of either the full ownership or the possession of his property.

The Romans had, at first, only two modes of real security; the pledge, *pignus*, which left the ownership with the debtor, but transferred the possession to the creditor; and the *fiducia*, which transferred both the ownership and possession to the creditor, but with the juridical and binding promise of the latter to reconvey and retransfer both ownership and possession to the debtor, on payment of the debt. In some cases, the creditor would leave the possession of the

* Irving, Civil Law, p. 96.

property with the debtor by agreement to that effect. The *fiducia* which, historically, belongs to the legal antiquities of Rome, and which the compilations of Justinian swept away altogether, bore a remarkable resemblance to the mortgage of the Common law, with its equity of redemption.

The transfer of both the title and the possession to the creditor was, in many ways, unnecessarily injurious to the debtor. The property being in the hands of the creditor only temporarily and conditionally, did not receive from him the care and fruitful management and improvement which the owner would bestow upon it himself. The debtor was also deprived of the use and enjoyment of his property, and sometimes of the means of obtaining additional credit from it. The Greeks had, by means of the *hypotheca*, resolved the question of giving to the creditor all the desired security by putting upon the debtor's property a right in favor of the creditor which attached to it and followed it into the hands of third persons, without depriving the debtor of its use and enjoyment. This system was so superior to the *pignus* and the *fiducia* that the Romans adopted it. The *pignus* was the spontaneous production of natural law. The *fiducia* was the creature of the formular and sacramental Civil law. The *hypotheca* was neither, and came to Rome as an institution of foreign extraction. It fell, therefore, under the authority and the protection of the prætor, and became an important branch of the præ-

torian law, to which the equity system of England corresponds and from which it drew largely. *

547. The equitable liens of the Common law produce the same effects as the hypothecation of specific property resulting from contracts express or implied. They are intended to secure the creditor by giving him a right of preference over the proceeds of the debtor's property, which attaches itself to the property and follows it into the hands of third persons; that is to say, that subsequent transferees or assignees with notice of the lien take the property subject to the claim of the creditor. But the possession must remain with the debtor. If the possession is transferred to the creditor, there is, or may be, a lien at law, but no equitable lien. The debtor, by agreement, express or implied, must have *intended* that the creditor should be secured by the equitable lien; and the lien must have been intended to bear upon some *particular* property.

The mere promise of the debtor to secure the creditor by mortgage or pledge of some specific property, will not of itself create the mortgage or pledge; but, if the promise is not fulfilled, it will give rise to an equitable lien on the property, and entitle the creditor to be paid out of its proceeds, by preference over other creditors, as if the debtor had, in reality, granted the mortgage or the pledge. This is of the very essence of the doctrine of equitable liens, as the

* Troplong, Des Hypothèques, Vol. 1, pp. 6 *et seq.*
Troplong, Du Nantissement, pp. 9 *et seq.*

intention of the debtor to secure the creditor by a charge or encumbrance upon some particular property enters largely into that doctrine.

In the transaction from which the equitable lien arises, the form of the contract, whether express or implied, is immaterial, provided the intention of the debtor to secure the creditor is not doubtful, and provided also that the property by means of which the security is given is clearly identified.*

548. These principles have received their application from the Supreme Court of the United States in numerous cases up to the present day. The uniformity of its jurisprudence on this subject has been but seldom disturbed. In a very recent case the court held that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation; or whereby the party promises to convey, or assign, or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers, or encumbrancers with notice. And the syllabus of the opinion shows, further, that to dedicate property to a particular purpose, to provide that a specified creditor, and that

* Pomeroy, Equity Jurisprudence, Vol. 3, Secs. 1235, 1237.
Flagg vs. Mann, 2 Sumn. (U. S.) 486, 533.

creditor alone, shall be authorized to seek payment from it or its value, is to create an equitable lien upon it.

In that case Walker & Co. were dealing in business with Lloyd & Co., who held certain bonds belonging to Brown, loaned by him to them to aid them in their affairs. Brown wrote to Walker & Co. a letter in these words: "I beg to advise you that the loan of fifteen thousand dollars, Memphis bonds, made by me to Mr. J. C. Lloyd for the use of Messrs. Lloyd & Co., Ellensburg, Wash. Ter., is with the understanding that any indebtedness that they may be owing you at any time shall be paid before the return to me of these bonds, or the value thereof, and that these bonds, or the value thereof, are at the risk of the business of Lloyd & Co., so far as any claim you may have against said Lloyd & Co. is concerned."

On the faith of that letter Walker & Co. sold goods on credit to Lloyd & Co. In the meantime, Lloyd & Co., who had pledged the bonds to the Union National Bank of Chicago, redeemed the pledge and returned the bonds to Brown. Subsequently he died, after having given the bonds to his wife. Walker & Co. claimed an equitable lien on the bonds against the administrators of Brown and his wife. The court decided that the language of Brown's letter clearly designated the bonds as security for the debt due Walker & Co., and declared the express intention of Brown to create an equitable lien upon them in favor of Walker & Co.*

* Walker vs. Brown, 165 U. S. 654.

549. In the same year in which that case was decided, the Supreme Court held that there was an equitable assignment, equivalent to an equitable lien, in a transaction in which a check drawn upon a bank was to be paid out of a particular fund, with the understanding between the drawer and the drawee that the particular fund drawn from was intended by the drawer to be the security of the drawee for the sums loaned by the former to the latter. The court made the distinction between a check drawn in ordinary circumstances, which creates no equitable assignment and entitles the holder to no priority of payment over the general creditors of the drawer, and a check drawn under circumstances which indicate the intention of the drawer to constitute an assignment of the fund in favor of the creditor for the purpose of securing him.

The Court said in that case: "Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that, if in the transaction connected with the delivery of the check, it was the understanding and agreement of the parties that an advance about to be made should be a charge on, and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers and parties charged with notice. This is but an application of the general doctrine of equitable assignments or liens announced by this Court in *Ketchum vs. St. Louis*, 101 U. S. 306, where it was

held, citing various authorities and text writers, that : ‘A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement.’ It is immaterial, for the purposes of this case, to draw a line of distinction between equitable assignments and equitable liens or charges.”*

550. There seems to be no difficulty in the establishment of an equitable lien when it results from the express terms of an agreement between the debtor and the creditor ; but when the intention to create the lien is only implied in the transaction, and to be inferred from the circumstances of the case, the question then is by no means of easy solution, and may give rise to the most diversified opinions. We find a remarkable instance of it in the well-known case of *Ketchum vs. St. Louis*. The issue involved was whether an act of the General Assembly of Missouri, under which the county of St. Louis loaned its bonds to the Pacific Railroad Company, created, on its acceptance by the company and the county, an equitable lien or charge, in favor of the county, upon the earnings of the road, to the extent necessary to meet the interest upon the bonds as it accrued. The act from which it was contended that the lien arose was in these words :

* *Fourth Street Bank vs. Yardley*, 165 U. S. 634.

“ Section 1. The county court of St. Louis county is hereby authorized to issue seven hundred county bonds of the denomination of \$1000 each, having twenty years to run and bearing interest at the rate of 7 per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

“ Sec. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, \$4000, and \$1000 additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad.

“ This Act to take effect and be in force from and after its passage.”

The Court held that this act, being accepted by the parties, constituted an equitable assignment of the earnings of the railroad company and created an equitable lien upon them in favor of the county. The majority of the Supreme Court *saw nothing doubtful*

in the implied intention of the parties to create the lien; but the two dissenting Justices were equally positive *that there is nothing in the transaction implying such an intention*. The Court said :

“ That the Legislature intended by the Act of 1865 to make a specific *appropriation* of the earnings for that purpose ; that the prior lien of the State was, to that extent, waived in favor of the county ; and that such appropriation and waiver were, by agreement of all the parties then interested in the property and the disposition of its income, to continue until the bonds themselves were paid or the county discharged from liability thereon, we entertain no doubt. It was not a simple, naked covenant to pay out of a particular fund ; but the Act, being accepted by the parties interested, operated as an equitable assignment of a fixed portion of that fund—an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner or some other person, could respect without liability to the debtor for so doing. It was an arrangement, based upon a valuable consideration, which neither the State nor the company, nor both, nor parties claiming under either, with notice, could disregard without the assent of the county, expressed by those who had authority to bind it. It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object, in

the accomplishment of which all the parties to the arrangement were directly interested.”

Two of the Justices of the court, on the contrary, declared that they were unable to discover in the contract between the company and the county, or in the act of the Legislature, or in either, anything that created an equitable lien upon the earnings of the railroad company, or upon any of its property; and that nothing more was expressed between the parties than a confident expectation that the earnings would prove sufficient to pay the interest on the county loan.*

We see therefore that there is in the understanding of equitable liens arising from an implied intention of the debtor the same difficulty and the same diversity of opinion that there is in the interpretation of all ambiguous agreements, an interpretation which is all the more difficult that the parties to the agreement themselves may not have had any clear or definite intention or understanding.†

* *Ketchum vs. St. Louis*, 101 U. S., pp. 306, 314, 319.

† *Williams et al. vs. Ingersoll et al.*, 89 N. Y. 508.

CHAPTER XLVI.

551. I find nowhere, either in treatises or in adjudicated cases, the nature and theory of the equitable lien so well explained as in the following words of Professor Pomeroy: "When equity has jurisdiction to enforce rights and obligations growing out of an executory contract, this equitable theory of remedies can not be carried out, unless the notion is admitted that the contract create some right or interest in or over specific property, which the decree of the court can lay hold of, and by means of which the equitable relief can be made efficient. The doctrine of equitable liens supplies this necessary element; and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law. It follows, therefore, that in a large class of executory contracts, express and implied, which the law regards as creating no property right, nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, *in addition to the personal obligation*, a particular right over the thing concerning which the contract deals, which it calls a 'lien,' and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates

directly on that thing. The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with, or in some manner relate to, specific property, such as a tract of land, particular chattels, or securities, a certain fund, and the like. It is necessary to divest one's self of the purely legal notion concerning the effect of such contracts, and to recognize the fact that equity regards them as creating a charge upon, or hypothecation of the specific thing, by means of which the personal obligation arising from the agreement may be more effectively enforced than by a mere pecuniary recovery at law."*

552. The *hypotheca* of the Romans was a mode of contractual security; the right of preference arose from a stipulation between the creditor and the debtor; the nature or quality of the debt was no condition of the encumbrance upon the debtor's property, any more than in the modern mortgage of either the Civil or the Common law. But the Romans had also the *privilegia* as a mode of real security attaching to the *res*, the property of the debtor, in favor of the creditor, and giving to the latter a right of priority over the other creditors of the former. The *privilegium*, like the *hypotheca*, left the possession of the property with the debtor, but fixed upon it the legal tie or lien which followed it into the hands of third persons and secured the creditor's right of preference. Such are the privileges of the modern Civil law. They have, in common with

* Pomeroy. Equity Jurisprudence, Vol. 3, pp. 232, 233.

the equitable liens of the Common law, the principle that they do not deprive the debtor of the use and enjoyment of his property, and that they follow it and remain attached to it. But they differ from the equitable liens in two fundamental principles: first, they are not and can not be created by contract, but arise solely from the law; and secondly, they may bear, at the same time, upon several pieces of property, and are not always limited in their action to any particular or specific one. Inasmuch, therefore, as the equitable lien is created by the consent and intent, express or implied, of the debtor, and the *privilege* is created by the law only, without the consent of the debtor, we may say that the Civil law has no equitable liens and repels them.

553. The privileges are established by reason of the nature and quality of the debt, and, therefore, are made to affect either the debtor's property generally, or some particular one. And, as the law deems certain obligations to be of a higher order than others and should, therefore, be satisfied first out of the debtor's property, it follows, first, that privileges are superior to mortgages and rank them in the distribution of an insolvent's assets; and, secondly, that among the privileges themselves some are of a higher order than others and are the first to be satisfied.

Domat defines them in a clear and terse manner: "The privilege of a creditor is the superior right which the quality of his claim gives him and for

which he is preferred to other creditors, even to the mortgage creditors." *

554. The general principles of the law of privileges are well stated in the following articles of the Civil Code of Louisiana, which have been taken *verbatim* from the Code Napoleon :

Article 3182. "Whoever has bound himself personally is obliged to fulfil his engagements out of all his property, movable and immovable, present and future."

Article 3183. "The property of the debtor is the common pledge of his creditors and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference."

Article 3184. "Lawful causes of preference are privileges and mortgages."

Article 3185. "Privileges can be claimed only for those debts in which it is expressly granted in this Code."

Article 3186. "*Privilege* is a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages."

Article 3187. "Among creditors who are privileged, the preference is settled by the different nature of their privileges."

* Droit, Lois Civiles, Sec. 5, p. 35.

Pont, Des Privileges, Vol. 1, pp. 16 *et seq.*

Battur, Des Privileges, Vol. 1, p. 1.

Troplong, Des Privileges, Vol. 1, pp. 13 and 28.

Article 3188. "The creditors who are in the same rank of privileges are paid in concurrence, that is, on an equal footing."

Article 3189. "Privileges may exist either on movables or immovables, or on both at once."

Article 3190. "Privileges are either general or special on certain movables." *

555. It follows from these principles that, not only privileges can not be stipulated between the debtor and the creditor, but, furthermore, they can not be extended by implication from the letter of the law which establishes them. They are *strictissimæ interpretationis*. Where they are not specifically established by statute, they do not exist at all, and can not be brought into existence by custom. The rule has so often been declared and applied by the Court of Louisiana that it has become a trite subject in the jurisprudence of that State.†

556. Yet, in two cases, the equitable lien, as such, but not *eo nomine*, has been recognized by the Court of Louisiana. It was evidently a departure from the true doctrine of the Civil law and a submission to the pressure of the Common law and equity jurispru-

* Code Napoleon, Arts. 2092, 2093, 2094, 2095, 2096, 2097.

† Landry vs. Blanchard, 16 La. An. 173.

Martin vs. Casey, 15 La. An. 165.

Shaw & Co. vs. Grant, 13 La. An. 52.

Swasey & Co. vs. Steamer, 12 La. An. 800.

Cochran & Co. vs. Walker, 10 La. An. 431.

Shropshire vs. Russell, 2 La. An. 962.

Labonisse vs. Rope Company, 43 La. An. 245.

State vs. Bank, 33 La. An. 706.

Bank vs. Moreau, 37 La. An. 861.

Morris *et al.* vs. Lalaurie *et als.*, 39 La. An. 53.

clence. For instance, when the scrip certificates of a mutual insurance company were transferable on the books of the company only by the scripholder or his agent, and, in case the scripholder was indebted to the company, the amount of the scrip was, by the charter of the company, to set off the indebtedness, the administrator of the deceased scripholder's estate having sold the scrip, and demanding that the company should be ordered to make the transfer on its books to the purchaser, the court recognized the right of the company to be paid the proceeds of the scrip by preference over the other creditors of the decedent. The court clearly recognized the equitable lien in this case when it said: "It may be conceded that the company is not entitled to a *privilege* upon the fund in dispute, using the term in its technical sense. But we think the equity of the company to receive this fund by reason of the peculiar terms of their contract with Walsh and the circumstances of the case is clear." *

It would not be possible to acknowledge and apply the equitable lien more distinctly, however incompatible it may be with the doctrine of the Civil law privilege.

557. In another remarkable case, the Court recognized again the principle of the equitable lien and applied it. A planter and sugar manufacturer had agreed with his commission merchant that, for the purpose of more completely securing the latter for his

* Succession of Walsh, 9 La. An. 543.

advances, the merchant would apply in his own name to the United States Government for a license as producer of sugar, under the bounty law of Congress; and that the amount of bounty received by the merchant would be retained by him in payment, or part payment, of his advances to the planter. It was so done. The planter subsequently failed, and his creditors contested the right of the commission merchant to retain the amount of bounty received by him, on the ground that he had neither a pledge nor a privilege under the law of Louisiana. The Court said: "The contract between the parties in reference to the license may be an innominate one, possibly it may not be strictly classed as a pledge, but be it what it may, it was legal and vested the legal title to and control over the bounty, and authorized its application in a manner and to a purpose which neither Lacaze (the planter) nor his syndic can disregard."*

The *motive* of the decision, rather than the reason of it, was clearly the equity of the case, and a submission to the principle which constitutes the equitable lien of the Common law, to-wit: the intention of the debtor, expressed in the contract, to secure the creditor out of a particular fund. The decision could reasonably stand upon no other ground; there was in the case neither a pledge nor a privilege under the Civil law, nor a chattel mortgage under the Common law. The *legal* title, as distinguished from the equitable title, is unknown to the Civil law as a tenure of

* Webre, Syndic, vs. Beltran & Co., 47 La. An. 203.

property. There was in the case only one principle or rule of law, and that was the equitable lien. The judgment was, therefore, in opposition to the law of Louisiana, inasmuch as, in that State, the pledge and the privilege are the only two legal modes in which personal or movable property can be used as security of a debt.

The statutory or codal law of that State is clear, positive and exclusive of any common law, in matters of privileges. It is even expressly and specifically prohibitive of any extension by the courts, of the class of privileges established by the Code. Art. 3185 provides that: "Privilege can be claimed *only* for those debts to which it is *expressly* granted in this Code."

558. The jurisprudence of the State has been emphatic on this point in a long line of decisions. Such expressions as the following are found in every one of them: "The stipulation in an act of sale, that the amount paid by the vendor to insure the property sold, in case he neglects to do it, shall be secured by privilege on the property, *has no legal effect whatever, as privileges can only be created by law, and not by the agreement of parties.*"*

The fact that, in the case quoted from, the license for the bounty was applied for and obtained in the name of the merchant, was a matter between the government and him; but that did not make the bounty money his own, for, by his very agreement

* State vs. Bank, 33 La. An. 705 (Syllabus).
Bank vs. Maureau *et als.*, 37 La. An. 861.

with the planter, and as recognized by the Court, it was to act *as security* of the debt.

559. The same Court decided, the year after, that the bounty, under the same law of Congress, could not be the subject of a pledge under the following circumstances. It was agreed between the planter and the commission merchant, in order to secure the latter for his advances, that the planter would pay the bounty to the creditor immediately after receipt of the amount, "just as if the bounty had been a portion of the proceeds of the crops of the plantation." The Court said: "It is hardly necessary to cite authority in support of the proposition that delivery is an essential in order to secure a pledge (save in statutory pledges, not the case here). The bounty was not a portion of the proceeds of the crop; it was no part of the crop. We know of no principle of interpretation under which it is possible to hold that the bounty was delivered as required, and came within the provisions of the statute relative to pledge as security."*

In this case, the Court properly disregarded, under the principles of the Civil law of Louisiana, the equitable lien which, at Common law, would have sprung, in favor of the creditor, from the debtor's express intention to secure him out of a particular fund.

560. In another instance the Louisiana Court rejected also what would be under the Common law very clearly an equitable lien, if not an equitable

* Delogny vs. Creditors, 48 La. An. 493.

mortgage. In that case Benjamin obtained from Aldigé the loan of a sum of money to enable him to pay the price of real estate purchased by him. He gave the lender his note of hand for the same amount payable to the order of the lender and declaring in the note that the amount had been advanced to him by Aldigé to pay for the property. Benjamin then went before a notary public and made the sworn declaration, written on the back of the note, that he was indebted to Aldigé in the sum stated in the note, and that the money was advanced to him by Aldigé to pay for certain property which was described and identified in said declaration. He stated further, in the same writing, on the back of the note: "That, in order to secure the payment or reimbursement of the said sum to the said Aldigé, he, the affiant, does hereby recognize and acknowledge in favor of the said Aldigé a privilege and lien on the above described property, and he does also authorize the recording of the said lien and privilege in the office of the recorder of mortgages for the parish of Orleans."

The document was recorded. The question arose as to the right of preference or priority of Aldigé under the terms of the agreement, over the proceeds of the property. By the law of Louisiana it is necessary for the validity of a mortgage that the contract be in writing, private or authentic, that the amount secured be stated and that the property mortgaged be described and identified. The court held that the document in question did not establish a privilege or

lien because such can not be created by contract, and that it did not establish a mortgage because the intention of the parties was to establish a privilege or lien.

The chief justice of the court dissented on the ground that the fact that the parties used the words *privilege and lien* did not invalidate the transaction, when, in reality, they intended to establish a mortgage on the property to secure the loan; and that, besides, the term *lien* was generic and could be used to mean *mortgage*, and had on many occasions been used in that sense by the courts of Louisiana.*

561. These questions of equitable liens, established and enforceable under the Common law, and denied and repelled by the Civil law, present great difficulties and are fraught with very serious consequences when they are raised in the State of Louisiana, in the Federal Courts sitting in that State. Then arise the anomalies, the inconsistencies, the contradictions, amounting to injustice, or its equivalent, the want of equal justice, of a dual system of jurisdiction and of jurisprudence in the same State. Under the law of Louisiana no preference or priority is afforded to creditors over the proceeds of the movable or personal property of the debtor, unless it is by virtue of statutory privilege or contractual pledge. Under the principles of equity jurisprudence the mere consent and intention of the debtor to grant such preference or priority creates an equitable lien. Under one system of law, an inchoate pledge, lacking the essential

* Succession of Benjamin, 89 La. An. 612.

elements of that kind of contract, but showing the intention and promise of the debtor to make a valid one, is perfected by the court of equity and given full effect to. Under the other system, the imperfect pledge, on the contrary, produces no effect whatever, and the court of law, far from validating the incomplete contract, sets it aside altogether. If, in a case of this kind, the Federal Court will apply the statutory law of Louisiana, there is no conflict or antagonism between its judgment and that of the State Court in a corresponding case. But if the Federal Court, on the contrary, will ignore the statutory law of Louisiana and apply the principles of equity jurisprudence, then there are, in similar cases, two opposite judgments. The alien is decreed in one court to be a privileged creditor; the citizen of Louisiana is decreed in the State Court to have no privilege. Two laws, therefore, which are in direct conflict with each other and are destructive of one another are found to coexist in the same State, and to be administered by different tribunals upon different classes of persons. The foreigner is declared to possess valuable rights which the citizen of the State in similar cases is declared not to possess, under the same municipal law, which should apply to both equally and in the same manner.

562. But the question of the power of the Federal Courts to recognize the validity of equitable liens in Louisiana when the law of the State forbids them is far from being settled. In one case only did the Supreme Court of the United States declare that an

equitable lien could be found in Louisiana. But the case turned upon the law of insurance and the right of the mortgagee to receive the insurance money under a policy taken by the mortgageor. There was no competitor, or other creditor, claiming an equal distribution. There was no question of the right of preference or priority arising from the equitable lien. The authorities cited by the Court from the jurisprudence of Louisiana only showed that the doctrine of equity obtained in that State; but not as a cause of preference or privilege or priority. The question whether the Federal Court, in its equity jurisdiction, could ignore the municipal law of the State when the latter was not in conflict with the Constitution or laws of the United States, was not, even remotely, considered in the case.*

563. In the well-known case of *Casey vs. Cavaroc*, there was a promise of pledge on the part of the debtor, and an informal and insufficient execution of the contract. It was a clear case for a court of equity, out of the State of Louisiana, where its municipal law would not allow it, to recognize the equitable lien arising from the agreement of the parties, and to enforce it, however defective the pledge. But the Supreme Court of the United States would not recognize the validity of the pledge and rejected the claim of the creditor for a preference over the property which was intended to serve as security of his claim; the court deciding that, under the law of Louisiana, he

* *Wheeler vs. Insurance Company*, 101 U. S. 439.

was entitled to no privilege or priority the moment his pledge was null.*

564. In a very recent case, the parties to a contract had stipulated in favor of the creditor, for an equitable lien over the sugar bounty money to be paid to the producer, who was the debtor in the case. There, the question was squarely presented, whether the equitable lien could be recognized by the Federal Court notwithstanding the law of Louisiana which prohibited it. The Circuit Court of the United States held that, under its equity jurisdiction, it was not controlled by the State law, and decreed the validity of the equitable lien. The Circuit Court of Appeals would not decide the point and certified it to the Supreme Court, which disposed of the case on a different ground, but would not express an opinion on the point in question. The Supreme Court said:

“The right to collect the bounty having arisen from a law of the United States, and the provisions of the law creating a necessary relation between the grower and the manufacturer, making them in effect joint producers of the sugar, the right to the equitable lien stipulated by the contract was not controlled by the provisions of the local law of Louisiana, even although, as a general rule and in regard to this we express no opinion, the effect of that law would be to deprive contracting parties, except when expressly allowed, of the right to contract for an equitable

* *Casey vs. Cavaroc*, 96 U. S. 467.

lien; and to deny to courts of equity the power to enforce the same.’’*

The question, therefore, whether equitable liens can exist and be enforced in Louisiana by the Federal Courts, notwithstanding its restrictive law of privileges, is still an open one.

This question of the jurisdictional power of the Federal Courts to recognize and apply the liens in equity in cases where the statutory law of the States forbids the recognition of them is of such paramount importance in this country that I think proper to produce at the end of the book † the argument and authorities presented in the Louisiana case referred to above, by the Counsel on both sides, who discussed the question with remarkable ability.

* *Burdon Sugar Refining Co. vs. Payne*, 167 U. S. 127.

† See page 529.

CHAPTER XLVII.

564. It must not be supposed from what precedes that the courts of Louisiana have no equity jurisdiction, and that the doctrine of equity is not recognized in that State, although it is not systematized there as it is in the Common law States and in England. The Supreme Court of the United States has said in that respect: "The equitable doctrine upon which the appellant's claim is founded undoubtedly obtains in Louisiana. It is derived from the principles of the Civil law, which is the basis of the Civil Code of that State, and it is supported by the authorities cited from the Louisiana Reports." *

The articles of the Civil Code of Louisiana relative to the doctrine of equity are the following:

Article 21. "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

From the terms of this article it is evident that no equitable lien should be recognized in Louisiana, as there is an express law which imperatively limits the existence of privileges to those established by the statute.

Article 1903. "The obligation of contracts extends not only to what is expressly stipulated, but also to

* *Wheeler vs. Insurance Company*, 101 U. S. 443

everything that by law, equity, or custom is considered as incidental to the particular contract or necessary to carry it into effect."

Article 1964. "Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources."

Article 1965. "The *equity* intended by this rule is founded on the Christian principle not to do unto others that which we would not wish others should do unto us, and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land and that which the parties have made for themselves by their contract are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity."

Those articles of the Civil Code of Louisiana are not taken from the Code Napoleon, which is silent on the subject of Equity, or from Pothier's great work on Obligations, the source from which the framers of the Louisiana Code have largely drawn, when they did not follow the French Code. The principles thus codified seem to be the production of indigenous legislation. The lawgivers of that State, at the same time that they meant to establish, or rather maintain, the Civil law, must have wished to infuse into it the doctrine of equity, without adopting the English system.

565. The peculiar admixtion of law and equity in Louisiana has been well explained by Mr. Hennen in his Digest. He states it in the following terms :

“ In the jurisprudence of this State no distinction is made between legal rights and equitable rights, between legal injuries and equitable injuries ; and in the administration of remedial justice, except so far as relates to the Federal Courts sitting within the State, the modes of proceeding and granting relief under the two systems are blended in one, and our courts are at once courts of equity and courts of law. Thus they will grant injunctions to prevent waste or irreparable injury ; to prohibit the unauthorized publication of private letters ; to suppress public or private nuisances, as well in cases of actual injury as in those of impending or probable mischief or inconvenience ; to restrain the undue exercise of a right against conscience and equity ; and in general to prevent any act which, if consummated, would afford ground for a claim for damages. They allow a resort to the conscience of a party, and will compel him to discover on his own oath facts within his knowledge material to any of the issues pending. They will compel the surrender of securities improperly retained, and grant relief in cases of lost instruments, upon such conditions as to operate a perfect indemnity, by protecting the obligor with adequate security. They will prevent a party from setting up a claim or title that would be against conscience, and will bind him by an equitable estoppel. They will supply the imperfect execution of instruments, and shape them to the true intent and

meaning of the parties. They afford full relief in matters of account, and are invested with a discretionary power *ex officio* to appoint auditors or experts, whenever it becomes necessary in the investigation of long and intricate accounts; and in implicated partnership concerns, though the right to exercise such an authority was, in some former decisions, questioned, yet the doctrine seems now settled, that under the class of those incidental powers necessary to the exercise of their jurisdiction, although not expressly given by law, they will appoint receivers for the settlement and liquidation of partnership matters. And in the adjustment of these matters they will compel the production of books of account, vouchers and other instruments whenever, in their investigation, such documents are discovered to be necessary, and even when in possession of third persons not parties to the suit. In the imputation of payments they will, in the silence of both parties, determine the mode of appropriation; and, when such imputation has been made by the creditor, the debtor will always be protected against surprise as well as fraud. In the relations of principal and agent they will generally regard the latter, not as the debtor, but as the trustee of the former, and, treating the mandate as a trust, they will not permit the trustee to take any profit to himself from the concerns of his trust, but will compel him to hold on to any advantage he may have acquired for the principal and to carry out the object of the mandate which he has undertaken; and in the settlement of their accounts relief will be given from

fraud, error or omission. They will enforce the payment of legacies, effect the partition of estates held in common and adjust disputes arising out of the confusion of boundaries. They will apportion contracts. They proceed upon the maxim that Equality is Equity, and will compel a contribution toward the discharge of a common burden, as in cases of general average. So they will abate legacies. They will open a dividend in the distribution of the assets of a succession in favor of creditors who have not been paid. In like manner they will compel a contribution between co-sureties, and subrogate the surety to the benefit of all the collateral securities of the creditor upon payment to the latter, which is regarded as the sale of the debt itself; and, if the creditor have impaired this right of subrogation, they will release the surety. They will marshal securities and determine priority as to contributions, and the rank of different claimants, holding liens on the same fund or estate. They will decree an account of assets and a due settlement of the estates of persons deceased or bankrupt; arrest the creditors in their race of diligence, and force them into the court, where the settlement of the estate is to be made, to litigate their claims together; they regard the property of the debtor, under a textual provision of the law, as the common pledge of his creditors, and view with jealousy all causes of preference or privilege, holding them to be *strictissimæ interpretationis*; and in all matters relating to the administration of such estates, they proceed according to the principles of

equity. They enforce contracts in favor of third persons, beneficially interested therein, and uphold equitable rights arising in the other States. They will decree a specific performance of contracts respecting real estate, and, when called upon to enforce a right respecting it, will avail themselves of their jurisdiction over the persons, to do justice relative to the subject matter, though beyond their jurisdiction. They will protect parties from vexatious litigation by proceedings analogous to those of bills of interpleader; they will provide for the safety of property in dispute pending litigation, and whenever it becomes necessary to protect the interests of a number of creditors concerned, to avoid a multiplicity of suits, they resort to proceedings analogous to those by which courts in other States have reached the equity of such cases; and, accordingly, they will decree a general administration of the funds, appoint a receiver if necessary, and make such further order as the exigency of the case may require. They in all cases compel him who seeks equity to do equity; and, in general, they will extend to parties litigant in the redress of their wrongs, and in the vindication of their rights, remedies, plain, adequate and complete. But the equitable powers of the court can be called forth only to enforce clear and well defined rights. And, though the fusion of law and equity in Louisiana be complete, yet, as we remarked, it is true only in this sense, that our courts are generally competent to afford such relief to parties, and in cases properly before them, as may be obtained in a judicial pro-

ceeding, either at law or in chancery, in those States which recognize the English division of remedies. But it does not follow that all the prerogatives claimed by courts of Common law and courts of chancery and all their artificial rules and peculiar dogmas are to be usurped in this State. Our people have always resisted the encroachments of foreign modes of procedure, and especially the doctrines and forms of chancery, the exercise of which was reluctantly conceded to the Federal Courts sitting in Louisiana, by a divided opinion of the Supreme Court of the United States. The popular and professional aversion to "English fictions and the complicated and artificial modes of proceeding called the chancery practice" will be found reflected in a resolution of the General Assembly instructing the Senators and Representatives of the State in Congress to procure an amendment to the act of 1824. That aversion dates from the cession of Louisiana to the United States, and whilst her constitutional and criminal law, her commercial law and her law of evidence have been assimilated to those of her sister States, the English system of equity has found no foothold in her jurisprudence; and its exclusion—not entrusted to ordinary legislation, but guaranteed by the organic law—has been industriously secured by the successive constitutions of 1812, and 1845 and 1852. Nor has this policy of the State received from her judiciary a reluctant support; and, in preserving our law relative to real property and its tenures in its simplicity, public order has been firmly

maintained by the courts against every attempt to introduce, within our limits, the involved jurisprudence of the Common law States.*

566. Merlin, one of the greatest jurisconsults of France, made a pithy remark on the subject of Equity when it exceeds its legitimate limits. He said: "In civil matters, where the law is clear and precise, in certain cases, it would be impairing Equity itself to depart from the law on the pretence of softening or modifying its provisions by the peculiar principles of a greater Equity. The law, then, which is given to the judges to be the immutable rule of their conduct, would have nothing certain, and the people would believe in vain that they can safely rely upon it. It is true that we must, in everything, consider Equity particularly. *In omnibus equitas maxime spectanda*. But this rule of law has no application, as we have said, except in the particular cases for which the law has not provided. When we have to decide in embarrassing difficulties, in order to be just, we must be equitable; but, except in such cases, the Equity of the law is necessarily paramount."†

567. Chief Justice Hale has expressed the same idea in fewer words, and said: "By the growth of equity on equity, the heart of the Common law is eaten out, and legal settlements destroyed."‡

These wise reflections of the great Civilian Merlin and of the eminent Chief Justice Hale are of them-

* Hennen's Digest, Vol. 1, p. 479.

† Merlin, Repertoire, *verbo* Equité.

‡ Rosearrick vs. Barton, 1 Ca. in Ch. 217.

selves strong arguments against the encroachments of the equity practice, and are condemnatory of the doctrine by which liens in equity would be recognized and enforced in a State from which the statutory law expels them.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 722.

THE BURDON CENTRAL SUGAR REFINING COMPANY *et al.*,
APPELLANTS.
versus
JACOB U. PAYNE *et al.*, APPELLEES.

*On a Certificate from the United States Circuit Court of Appeals for the
Fifth Circuit.*

BRIEF FOR JOHN H. MURPHY, INTERVENOR AND APPELLANT.

STATEMENT OF THE CASE.

H. M. Payne, J. U. Payne and J. U. Payne & Co. were the owners of three contiguous plantations in St. Landry parish, La., known as Barbreck, St. Peters and Anchorage, and, on June 16, 1892, they entered into a written contract with L. Murray Ferris and Wm. L. Ferris, of Poughkeepsie, New York, in which it was recited that the Messrs. Ferris proposed to *lease* the sugar house on the Barbreck plantation and to *purchase* the crops of sugar cane to be grown on the three said plantations by the said owners thereof. This dual purpose was effected by the contract, which is printed in full in the record. Some of the articles of said contract refer to the lease of the said sugar house, others to the purchase by the Messrs. Ferris of the said sugar cane; and in further recognition of the fact, as shown in the recital, that two distinct contracts—one of lease, the other of sale—were contained in said instrument and contemplated by the parties, the last article, in order to fuse the two contracts into one, provided that said contract was an entire contract, and that each stipulation and obligation therein were a part of the consideration for every other.

The eleventh article of said contract fixed the price of the cane to be delivered, thereunder, and the thirteenth article is as follows:

“The price of cane, as above determined, shall be paid as follows: \$2.75 per ton shall be paid, every Monday, for the cane delivered, dur-

ing the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments *so received by them*, until the whole of the said balance shall have been paid."

Under article twenty-four (24) of said contract the said L. Murray Ferris and Wm. L. Ferris transferred all their rights and liabilities under said contract to the Ferris Sugar Manufacturing Company, Limited, a corporation organized under the laws of Louisiana.

The McKinley tariff act, passed October 1, 1890, which provided for a bounty to sugar producers, was repealed, on August 28, 1894, and, on September 3, 1894, it was stipulated between the parties to said contract that the provisions of Arts. 11 and 13 thereof should be extended so as to apply to any bounty that might, thereafter, be granted by Congress to sugars produced from the crop of 1894.

The Ferris Sugar Manufacturing Company, Limited, operated the Barbreck sugar house under the terms of said contract from October, 1894, to January 4, 1895, and the said parties of the first part, J. U. Payne & Co. et als., sold and delivered to the said Ferris Sugar Manufacturing Company during the season under said contract ten thousand three hundred and seventy-seven (10,377) tons of cane grown upon premises other than those leased to said Ferris Company, for which the said Ferris Company owed a balance on the purchase price of four thousand five hundred and sixty-four 73-100 dollars (\$4564.73), on the contract basis of \$2.75 a ton, and a further sum of six thousand five hundred and seventy-nine and 30-100 dollars (\$6579.30), in the event that the bounty should be collected.

In the fall of 1894, the Ferris Sugar Manufacturing Company, Limited, became heavily involved, and, prior to this, a number of creditors, among them the Reading Iron Company and John H. Murphy, recorded vendor's privileges upon machinery sold by them to the said Ferris Sugar Manufacturing Company, Limited, and erected by it in the said Barbreck sugar house.

On January 4, 1895, upon application of the Burdon Central Sugar Refining Company, Limited, a corporation organized under the laws of New York, and an unsecured creditor of the Ferris Company to the extent of \$40,404.74, to the Circuit Court of the United States for the Eastern District of Louisiana, the Ferris Company was placed in the hands of a receiver. On March 25, 1895, H. M. Payne, J. U. Payne and J. U. Payne & Co. filed a petition of intervention in this suit, claiming the said balance of \$4564.73, and of \$6579.30, due them for cane sold and delivered to the said Ferris Company under said contract, and further claiming that both said sums were secured by a lessor's privilege

on the property of the said Ferris Company at the said Barbreck sugar house, and that the said latter sum, namely, \$6579.30, was also secured by an equitable lien on any bounty that might, thereafter, be collected by the receiver.

The court decided that the said intervenors were entitled to a lessor's privilege upon the movable effects of the said Ferris Company and of third persons upon the said leased premises to secure both said sums due for the unpaid price of the sugar cane, in addition to an equitable lien on the bounty which might be collected on sugars made from cane, sold by the said intervenors, to secure the said sum of \$6579.30, in preference to all other creditors of the said Ferris Company.

From this decree the said Burdon Central Sugar Refining Company, complainant, the said Reading Iron Company and John H. Murphy, intervenors in this suit, as creditors of the said Ferris Company for large amounts, took an appeal and made the following assignment of errors:

"1st. Said court erred in decreeing that said intervenors, J. U. Payne et al., are entitled to a privilege and right of pledge as lessors upon the movable effects of the defendant on the leased premises to secure the sums due said intervenors for cane sold and delivered by them to said defendant, amounting to \$4564.73 and \$6579.30.

"2. Said court erred in decreeing that said intervenors are entitled to an equitable lien on the bounties which may be collected on sugars made from cane belonging to said intervenors and taken off by the defendant, or its receiver."

The case was twice argued in the circuit court of appeals, the latter time upon the request of the court, and the court, thereupon, certified the following questions:

"1. It being shown that the cane sold by appellees, J. U. Payne & Co. et als., to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited, are appellees, under the laws of Louisiana, considered, in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane?

"2. Under the terms of the 13th article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar cane, sold and delivered under said contract, have the appellees, H. M. Payne, J. U. Payne and the members of the firm of J. U. Payne & Co., an equitable lien upon the bounty money collected from the United States by the receiver in this suit?

"3. If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the

claim of the Paynes to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company?"*

Third Question.

We shall reverse the order of discussion of the second and third questions because it can make no difference whether, according to the general principles of equity jurisprudence, the Paynes have an equitable lien on the bounty money or not, under the thirteenth article of the contract, if such a lien is denied by the statute laws of Louisiana, by which law the federal court must be governed in this case. The natural, necessary and primary inquiry is, what is the Louisiana law? We are prepared to show that, even under the general principles of equity jurisprudence, the Paynes have no equitable lien on the bounty money, but we shall now address ourselves to the proposition that an equitable lien, such as is claimed by the Paynes in this case, is forbidden by the laws of Louisiana, and expressly denied by a recent decision of the Supreme Court of Louisiana, and to the further proposition that a federal court of equity must in this case follow the Louisiana statute law, granting for the sake of the argument, that the equitable lien, contended for in this case, is allowed by the general principles of equity jurisprudence.

First.

I.

The Revised Civil Code of Louisiana contains the four following consecutive articles:

*The Supreme Court answered the first question in the negative, denying the asserted lessor's privilege, and the second and third in the affirmative, on the ground that the language used created an equitable lien on the bounty collected, under the general principles of equity jurisprudence; that the sugar bounty arose from an act of Congress, which created a link between the manufacturer of the sugar and the grower of the cane from which it was manufactured; and that in this case State laws could not operate upon the transaction to the extent of destroying the statutory link and thus nullify the intention of Congress. As to whether or not, as a general proposition, federal courts of equity, in matters of substantive law, where their jurisdiction is concurrent with State courts, and where no federal question is involved, are bound by State laws, the court reserved its opinion. An elaborate statement of the facts will be found in 167 U. S. 127, where the case is reported. The portion of the brief discussing the lessor's privilege, the first certified question, is omitted, as is also that portion of the discussion which attempted to show that under the general principles of equity jurisprudence no equitable lien existed in this case. The above statement of facts is reprinted from the brief, and there follows that part of it which undertakes to prove that a lien such as was claimed in this case, is forbidden by the Louisiana law, and that a federal court of equity, sitting in Louisiana, is bound by the Louisiana law, even if under the general principles of equity jurisprudence an equitable lien would have been allowed.

[AUTHOR.]

Art. 3183 (3150). The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful cause of preference.

Art. 3184 (3151). Lawful causes of preference are privilege and mortgage.

Art. 3185 (3152). Privilege can be claimed only for those debts to which it is expressly granted in this Code.

Art. 3186 (3153). Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages.

These four articles follow in logical order. The first announces the principle that there must be a ratable distribution of a debtor's property among his creditors, unless there are lawful causes of preference; the second defines lawful causes of preference to be privilege and mortgage; the third restricts privileges to those debts to which the Code expressly grants them; the fourth excludes the idea of a conventional privilege. These articles have been repeatedly applied by the courts of Louisiana, and they are as well established as a uniform interpretation for many years can make them.

Privileges can not be extended by implication or analogy; they are never allowed except when expressly granted by law, and then only by virtue of an exact compliance with the legal requisites essential to their creation and existence. Privileges can not be created by convention between the parties and must derive their existence from the nature of the contract and from the law applicable thereto. *Privilegia sunt strictissimæ interpretationis.*

Grant vs. Fiol et al., 17 La. 162.

Whatley vs. Austin, Adm., 1 Rob. 22.

Fish vs. Moores, 11 Rob. 280.

The First Municipality vs. Hall, 2 An. 549.

Lee vs. Creditors, 2 An. 602.

Fontenot et al. vs. Soileau, 2 An. 774.

Friend vs. Fenner et al., 2 An. 790.

Shropshire vs. Russell, 2 An. 962.

Stevens et al. vs. Sawyer et al., 3 An. 429.

Harned vs. Churchman et al., 4 An. 313.

Cochran & Co. vs. Walker, 10 An. 431.

Swasey & Co. vs. Steamer Montgomery, 12 An. 800.

Shaw & Co. vs. Grant, 13 An. 52.

Martin vs. Casey, 15 An. 165.

Gause vs. Bullard, 16 An. 107.

Landry vs. Blanchard, 16 An. 173.

“If privileges be *stricti juris*, there is still greater reason so to consider them when advanced against innocent third persons.” Shaw vs. Grant, 13 An. 52.

“Privileges are *stricti juris*, and as against third persons must be clearly and conclusively established.” *Rochford vs. Geraghty*, 10 An. 429.

The following extracts from two decisions, applying Art. 3183, may be given:

“The property of the debtor is the common pledge of his creditors, and the right of the creditors to sell it, and to cause the proceeds to be distributed ratably among them, unless there exist some lawful cause of preference, is a necessary consequence of this principle. Civil Code, Art. 3150 (R. C. C. 3183).” *Larthet vs. Hogan et al.* 1 An. 330.

“It is urged by the appellants that the property of the debtor is the common pledge of his creditors. C. C. 3150 (R. C. C. 3183). And that privileges are to be allowed only when expressly granted by the Code. *Ib.* 3152 (R. C. C. 3185). The position is correct.” * * *

Stevens vs. Sawyer, 3 An. 429; also see *Owens vs. Davis*, 15 An. 24. and *Southern Dry Dock Company vs. Bayou Sara Packet Co.* 24 An. 217.

II.

The agreement between J. U. Payne & Co. and the Messrs. Ferris was, in substance, that a future debt of indeterminate amount should operate as a *lien and privilege* on a fund to be, thereafter, created. There was no assignment of this fund by the debtor to the creditor; there was no attempt nor intention to assign it, either in whole or in part. The creditor was to have a lien or privilege on it, but he was not to own it. The debtor was to earn, represent and collect the bounty, notwithstanding the supposed creation of a lien on it.

That such an arrangement constitutes no pledge and gives rise to no legal privilege under the law of Louisiana is unreservedly admitted by the learned judge *a quo* in his written opinion in this case (reported in 78 F. R., p. 417), and is not seriously denied by the counsel for J. U. Payne & Co., and in view of this fact it is not necessary to discuss at any great length the requisites of a pledge.

Under the Civil Code a debtor can not pledge a claim unless “*he make a transfer of it in the act of pledge*” (Art. 3153), and unless further the act mentions “*the amount of the debt*” secured (Art. 3158).

No transfer of the anticipated claim against the United States was made, and the amount of the claim intended to be secured was not stated, even by giving a maximum amount. There was no delivery of the bounty, or of the evidence of the right to claim it. Every essential element in the contract of pledge was wanting. The agreement did not, therefore, give J. U. Payne & Co., as pledgees, any right of preference over other creditors. The Supreme Court of Louisiana has expressly decided that an attempt, in every particular like this, to pledge the bounty was ineffectual and null.

“As relates to the pledge, the facts are that the mortgagor bound

herself to pay the bounty of the government to the creditor immediately after the receipt of the amount, 'just as if the bounty had been a portion of the proceeds of the crops of the plantation.' The bounty was not delivered at the time the attempt was made to pledge it as an additional security for the debt. It was collected from the government by the syndic, some time after the act of mortgage had been executed. It is hardly necessary to cite authority in support of the proposition that *delivery is an essential* in order to secure a pledge (save in statutory pledges, not the case here). The bounty was not a portion of the proceeds of the crop; it was no part of the crop. We know of no principle of interpretation under which it is possible to hold that the bounty was delivered as required, and came within the provisions of the statutes relative to pledge as a security." *Deligny vs. Her Creditors*, 48 An. 492-93.

The Deligny case is identical with the present, and establishes beyond any possibility of a controversy, that no pledge was constituted by the agreement now under consideration. It is even stronger, because the mortgagor bound herself to pay over the bounty to the creditor *just as if* the bounty had been a portion of the proceeds of the crops of the plantation, in order to make the obligation in the strongest possible form.

In an earlier case the Supreme Court held: "That the bare agreement of the parties is not equivalent in any case to a fictitious or symbolical delivery" within the meaning of the article requiring delivery to constitute a pledge. *Caffin vs. Kirwan*, 7 An. 221.

That parties can not create a *privilege* on any particular property by contracting that a privilege shall exist on it, is well settled. In a recent case the Supreme Court of Louisiana, commenting on a written stipulation that insurance premiums should operate as a *privilege* on certain property, say:

* * * "Privileges being creatures of the law, and not of conventions, the mere declarations in the act that the insurance premiums should bear a *privilege* on the property are without effect." *State vs. Bank*, 33 An. 706, opinion by Mr. Justice Fenner of counsel for appellees in this case.

And in a later case the same court say:

"It needs no argument to dispose of his pretensions to a *privilege* on the buildings and improvements as a security for his advances, although such a *privilege was stipulated in his act of pledge* with Logan. The law confers no such privilege, and none can be enforced. A *privilege can not be created by convention between the parties*; it must derive its existence from the nature of the contract and from the law applicable thereto." *Citizens Bank vs. Maureau*, 37 An. 861. Mr. Justice Fenner concurring.

It is true that R. C. C. 1338 employs the phrase, "the mortgages, liens and privileges," but it is fair to assume that the mortgages, liens

and privileges, recognized and established by that Code alone, were in contemplation of it.

They are merely securities for debts and accessories to principal contracts (R. C. C. 3278, 3284). They "can be claimed only for those debts to which they are expressly granted in this Code (R. C. C. 3185).

"Their effect can not be extended to any cases not therein enumerated, by inference or comparison."

Morris et al. vs. Lalaurie et als., 39 An. 53: Mr. Justice Fenner concurring.

While the decision in *Delogny vs. Her Creditors* no longer leaves the question of the asserted equitable lien in this case an open one, and, while it is perfectly apparent that the creditor in that case would have been in no better position if he had claimed an equitable lien, still appellees' learned counsel argue that the equitable lien here asserted would be allowed by the Supreme Court of Louisiana, and in support of this prophecy cite two Louisiana cases, prior to the *Delogny* case. They seem to regard an equitable lien in a federal court as a magic device for evading the Louisiana law and as a means of accomplishing by indirection that which the Code expressly forbids. It is idle for both courts and lawyers to speculate as to how a case would have been decided, had it been differently presented, and the only guide is not the law as it might have been, but as it is. We assert that equitable liens, either express or implied, have never been recognized in Louisiana, *since the Louisiana law is purely statutory*, and therefore all liens and privileges must be founded upon statute. But whether this broad proposition is correct or not, and of it there can not be the slightest doubt, certain it is, that the *Delogny* case establishes beyond the peradventure of a doubt that the equitable lien, or imperfect pledge, or what not, asserted in this case, can not be maintained, and that is all with which we are at present concerned.

The two cases relied upon by appellees' learned counsel to support the contention that equitable liens give privileges in Louisiana are *Succession of Walsh*, 9 An. 543, and *Webre, Syndic, vs. Beltran & Co.*, 47 An. 195.

In the *Walsh* case the facts were that Walsh left at his death two scrip certificates in an insurance company, upon which he owed the company a considerable sum for premiums. These certificates, by an express clause written in them, were not transferable upon the company's books, *except by its consent*, and under this restriction and under its charter the company held the certificates as collateral for any amount that might be due it upon them for premiums. The assured really made a contract by which the company was authorized to set off against him on the amount due him under the certificates, any amount that he might owe the company on these certificates for premiums. The court held, as it was bound to hold under these facts, that the insurance company could not be compelled to pay the amount of its

certificates, unless it were allowed to deduct the amount due it for premiums upon them.

In the case of *Webre, Syndic, vs. Beltran & Co.*, A. J. Lacaze made a contract with Beltran & Co. to furnish him with money and supplies to the extent of \$8000 during the season of 1892, in order to make a crop of sugar and molasses on his Good Will plantation, and he pledged his crop and mortgaged his plantation to secure said advances. During 1892 R. Beltran, of the firm of Beltran & Co., and as a part of the agreement with Lacaze, applied to the United States authorities (under the act of Congress granting a bounty to the sugar producers) for a license as a producer of the crop of that year upon the Good Will plantation. The license was issued to R. Beltran, who thereby became the only person to whom the bounty could be paid, since the entire legal title was vested in him. After the cession of Lacaze, Beltran collected the bounty and paid it over to Beltran & Co., to be applied on the debt due them by Lacaze, pursuant to a verbal contract between them made in 1892. Upon suit brought by the syndic of Lacaze to recover this bounty from Beltran & Co., the court held that the legal title to the bounty was vested in Beltran by virtue of the fact that the license was in his name; that the contract was completely executed between Beltran and the government by the payment of the bounty to him; that in order to obtain the benefit of the license Lacaze and his syndic would have as plaintiffs to attack it and its results; and that the contract between Beltran & Co. and Lacaze authorized the application of the bounty to the debt of Beltran & Co.

These cases are not authority for the maintenance of an equitable lien in Louisiana, and, in passing, it may seem strange that, if equitable liens obtain in Louisiana, no instances of their enforcement can be found in the course of nearly one hundred years. It has been urged that privileges and mortgages are subordinate to *legal rights* existing on the property before the creation of the privilege or mortgage, and this is perfectly true; but it must be remembered that this subordination is only to *legal rights*, and that the specific equitable lien claimed in this case gave no legal right (*Delogny vs. Her Creditors, ante*).

Appellees' learned counsel concede, as well they might, that the thirteenth article of the contract gives no legal privilege under the law of Louisiana, but argue that there is no reason why the contract should not be specifically enforced under Arts. 1926 and 1927 of the Code. This same reasoning would apply to any imperfect pledge or mortgage, and the result would be that, as soon as a fatal legal defect is discovered in the attempted security, specific execution would be invoked. This might be convenient to the man with the defective security, but is hardly law. It is urged that Arts. 21, 1903, 1964 and 1965 of the Code establish a broad system of equity, but, even if this be true, it does not follow that a broad system of equitable liens obtains in Louisiana. Article 21 declares: "In all civil matters, where there is *no express law*

the judge is bound to proceed and decide according to equity." Does any one suppose that privileges in Louisiana are not regulated by the most minute provisions: which are rigidly scrutinized by the courts?

Second.

I.

The stipulation contained in the 13th article of the agreement between Payne & Co. and the Messrs. Ferris did not establish either a *pledge* or *privilege* in favor of Payne & Co. If the parties were in the Louisiana State courts, Payne & Co. would not be entitled to any preference, or priority, over other creditors in the distribution of the bounty money, which the receiver has collected. It would be held in these courts that the stipulations in the 13th article created neither a pledge nor a privilege, and that Payne & Co. would be without any legal right of preference over other creditors. The fund would, therefore, be prorated among all the creditors.

Notwithstanding that this would be the admitted and certain result of a suit on this contract in the State court, the learned judge *a quo* reached the conclusion that Payne & Co. would be entitled by virtue of the stipulations in the 13th article to a preference in the federal court, sitting as a court of equity.

In other words, an agreement which, under the laws of Louisiana, neither creates a pledge nor gives rise to a privilege, will be given the same effect by the federal chancellor as if it did create a pledge or give rise to a privilege. Accordingly the creditor, under this agreement, will have no preference, if his suit is decided by a State court, but will have a preference, if his suit is tried by a federal court; that is, the rule of law, which determines the *extent of the creditor's rights* with reference to the common debtor, is different in the federal court from what it is in the State court. In the State courts the rule is that the wish, the intention, or the attempt to create a pledge, amounts to nothing, *if any of the essential requisites to the contract of pledge are actually lacking in the transaction*. But, according to the learned judge *a quo*, in the federal equity courts the mere expectation, or attempt to create a pledge, will be regarded as actually creating a pledge, not only between the parties, but as to third persons, although the transaction presents none of the essential requisites of the contract of pledge, except the bare consent to create it on the one side and to accept it on the other.

Under this view, an intended and inchoate contract of pledge is worthless as a pledge in the State courts, but in the federal courts it is as valid and binding as the most complete and perfect pledge would be.

If we rightly understand it, the process of reasoning by which the learned judge *a quo* reaches the conclusion that a federal equity court can hold that an inchoate and imperfect attempt to create a pledge,

though absolutely void under the State laws, is absolutely valid in the federal court, is, in substance, as follows:

1. The *equity powers* of the federal courts can not be limited or varied by State legislation. For these powers were conferred *by the constitution* of the United States, and must, therefore, still exist and be enforced precisely as they were conferred, in 1789, unaffected and undiminished by either State or Congressional legislation.

2. It was one of the powers of courts of equity, in 1789, to recognize and enforce under the designation of *equitable liens*, any inchoate and imperfect attempt to create a pledge, and to give the intended pledgee all the rights of preference, which would belong to the pledgee under a regular and valid pledge.

3. Therefore, in determining, at the present day, whether a given transaction does or does not create a pledge, the federal equity courts are in no manner controlled by the laws of the States, in which they sit, but may recognize and enforce as a pledge, lien, or privilege, a contract which the State laws distinctly declare to be neither pledge, lien, nor privilege.

The foregoing propositions are necessarily involved in the reasoning by which the learned judge *a quo* considered that he was warranted and required to disregard the laws and jurisprudence of the State of Louisiana in passing upon the question whether the agreement in controversy gave rise to a pledge or lien of any kind. This conclusion is fraught with tremendous and far-reaching consequences to the States of this Union, and it is beyond the power of any man to magnify or exaggerate them. This case, involving as it does the question as to whether there is a uniform system of federal equity jurisprudence superior to State statutes, is fully as important as the first case, in which it was decided that there was no common law of the United States.

We believe that none of the propositions stated are true in such a sense as to sustain the conclusion based on them, and that the Supreme Court of the United States has frequently so decided.

Before discussing this question, it is necessary to make some general observations upon the nature of the federal government and its relations to the State governments, and thus determine their respective powers.

It is a familiar proposition that the confederated character of the United States government makes each citizen of every State a citizen of two distinct sovereignties, and that there exists an important concurrent jurisdiction in the federal and State courts. From the existence of this concurrent jurisdiction, it might be inferred that the same rights were differently adjudicated in the two courts, and it becomes a question of the gravest importance to determine the points of similarity and divergence between their decisions, both at equity and common law, and both upon matters of practice and substantive law. This involves a more comprehensive survey of the subject than is necessary to sustain our

position, and we shall limit the argument almost exclusively to matters of substantive law in courts of equity, which necessarily includes matters of substantive law in courts of common law, because the reason and extent of the rule are the same in both cases.

The federal government is one of enumerated powers, formed by concessions of the sovereign States which compose it, embodied in the federal constitution, and by the tenth amendment, it is provided that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. It has no authority whatever save as to its delegated powers, and as to these it is supreme. In the States there resides an absolute power of legislation, subject to two restrictions—first, the limitations of the federal constitution; second, of the State constitutions; and the theory of the reserved powers of the States is the groundwork of our dual form of government. Cooley's *Con. Lim.* (6th ed.), pp. 102 *et seq.*; Hare's *Amer. Con. Law*, pp. 94 *et seq.* If it be once conceded that the powers of the federal government are unlimited, then Congress may legislate on all subjects, and, being supreme, may annul any State law. Congress has, however, no such power, and, by the very terms of the federal constitution, from which its powers of legislation are derived, must recognize the supremacy of constitutional State laws. The federal courts can have no higher authority than Congress, and if Congress can not alter or repeal the laws of a State upon some particular subject within its legislative province, it follows, as a matter of course, that the courts are bound to respect such laws.

The question in this case simply boils down to this: Are the provisions of the Civil Code, annulling such a contract as that sought to be set up by the appellees, in conflict with the federal constitution or laws? If they are, the federal courts can disregard them; if they are not, Congress could not alter them, much less the federal courts, and any attempt to do so would be in direct contravention of the tenth amendment.

Some unnecessary confusion has arisen in the consideration of the powers of federal courts of equity, by reason of the fact that their *practice*, save when changed by federal statute, or by the rules of the federal courts, is required to conform to the rules and usages of courts of equity (*U. S. R. S.*, Sec. 913, and cases cited), which has been interpreted to mean the procedure of the English High Court of Chancery, in 1789, and, hence, is necessarily uniform in all the States. Because their *practice* must be uniform and can not be affected by State legislation, the rule has been occasionally so loosely stated by text-writers as to apply to questions of substantive law, though the federal decisions are to the contrary. Thus, in the case of *Noonan vs. Lee*, 2 *Black*, 501, it was held that a decree could not be taken in a federal court for the deficiency against the debtor after selling the mortgaged property, no matter what the State equity practice might be. The learned judge a

quo quotes this case in his opinion as authority for the proposition that the equity jurisdiction of the federal courts is derived from the constitution and laws of the United States, and that their power and rules of decisions are the same in all the States.

In this particular case, the expression, equity jurisdiction, refers to a pure matter of *practice*, not of substantive law, and in every case it must be determined whether it relates to practice or rules of substantive law.

There is no federal statute regulating the decisions of the federal courts of equity upon matters of substantive law, and the fact that, at the time of the adoption of the federal constitution, a statute was enacted, requiring uniformity in federal equity practice, is a strong argument to show that it was never contemplated that the rules of the substantive law in each State, to which that practice would attach, were to be uniform throughout the Union.

On the other hand, it is argued that the adoption, at the same time, of a section of the judiciary act (U. S. Rev. Stats. 721), declaring "the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States," shows that it was never intended that federal courts of equity should be bound by State laws. This section of the judiciary act, declaring the binding effect of State laws upon federal courts of common law, was simply declaratory of a fact, that would have existed to the same extent without this declaration, namely that federal courts, by virtue of their constitution under an instrument of limited powers, are bound to follow State laws in matters of concurrent jurisdiction, involving no federal question. There is no process of reasoning by which the obligation of federal courts of equity to follow State laws can be differentiated from the obligation of federal courts of common law to follow State laws. The Supreme Court, from an early date, has qualified its obligation to follow State laws by announcing that in matters of general jurisprudence either at common law or equity, not covered by local statutes, *e. g.* general commercial law, it will, under no circumstances, follow State courts into error, since both reason from the same premises (*Swift vs. Tyson*, 16 Pet. 1); and, hence, the result has been in a good many cases of this class, as set forth in *Holt on Concurrent Jurisdiction*, that there is one justice in the federal, another in the State courts. "It was in maintaining the validity and enforcing the obligation of a negotiable instrument that the United States Supreme Court said: 'We will never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the sacrifice.'" *Dan. on Neg. Insts.*, Sec. 1800.

The question, how far State laws and decisions, not in conflict with the federal constitution or laws, are binding upon the federal courts, has been settled by a long series of United States Supreme Court decisions, which are a necessary consequence of the limited powers of the federal government. (See *infra*, *Burgess vs. Seligman*, 107 U. S., p. 25).

The fallacy, into which the learned judge *a quo* fell, would never

have been entertained for one minute, had not the term "uniform equity jurisdiction" been misconstrued, and it is, therefore, necessary to critically examine its meaning, and thus see whether his conclusions can be legitimately deduced from his premise, that federal equity jurisdiction (meaning jurisprudence, must be uniform in all the States. At the outset, it must be remembered that equity consists of two things: A jurisdiction, a power to hear and determine causes, and a jurisprudence, the substantive rules of law enforced. It consists of a form, its pleading, and a body, its principles. The skeleton, the procedure, is the same in all the States; but the body, the substance, necessarily varies with the statutes of each State.

Prior to the adoption of the federal constitution, in 1789, all suits, both in the thirteen colonies and in England, were classified as either common law or equity (eliminating admiralty causes from the discussion), and the nature of the demand determined the forum in which the right must be litigated. Thus, an action on a promissory note, or for damages arising from a tort, was a matter of common law cognizance, while a suit for the specific performance of a contract, or for the enforcement of a trust, was of equitable cognizance. The two systems covered the entire field of juridical rights and remedies, but generally radically differed, both in the nature of the rights enforced and the remedies applied.

It is well to repeat that it is provided by the tenth amendment that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, and it necessarily follows from this provision that the States are supreme in all those matters which involve no federal question, and have the power to enact such statutes in matters of State law and local policy as may seem to them best. Cooley's Con. Lim., Sixth Edition, pp. 20, 21 and notes.

The constitution provides that the judicial power of the federal courts shall extend to all cases in law and equity arising in all the classes of cases in which they have jurisdiction, enumerating them in detail (Art. 3, Sec. 2); and this provision is construed by the learned judge *a quo* to mean that the rules of equity jurisprudence then prevailing, have been stereotyped by the constitution and are insusceptible of change save by an amendment of that instrument. This doctrine must be deduced from this section of the constitution, since there is no other source from which it can spring. The manifest meaning of this provision is, that the litigant shall have complete relief in all cases of federal cognizance, whether his rights are at law or equity, and this is the interpretation given to it by Hamilton, as shown by the following extract from the Federalist, paper No. 80:

"It has also been asked, what need of the word 'equity?' What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation between individuals which may not involve those ingredients of fraud, accident,

trust, or hardship, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains; these are contracts in which, though there may have been no direct fraud or deceit sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey lands, claimed under the grants of different States, may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those States where the formal and technical distinction between law and equity is not maintained, as in this State, where it is exemplified by every day's practice."

If it be true that the then existing system of equity jurisprudence was adopted, why is it not equally true that the then existing system of law was also adopted, because the provision extends to all cases *at law and equity*, and if this be so, instead of a government of enumerated powers, there is one, the power of which extends to every subject of jurisprudence, and supreme to each State included in the Union. This construction would nullify the tenth amendment and violate the well-known rule of interpretation, that effect must be given to each clause of an instrument. It has been repeatedly decided by the Supreme Court of the United States that there is no common law of the United States (Cooley Con. Lim. [6th ed.], p. 30, note 3, and cases there cited), and exactly the same arguments prove that there is no uniform federal equity jurisprudence.

But there is another conclusive objection to this construction. At the time of the adoption of the federal constitution, there were thirteen distinct colonies, with a distinct system of law and equity in each. In each colony both law and equity had been modified by colonial statutes and by colonial courts, and in no two colonies were they the same. Therefore, to which one of these thirteen distinct systems does the expression, "all cases at law and equity," refer? It manifestly can not refer to them all, for in that event there could be no uniform federal equity jurisprudence. It is equally obvious that this expression can not refer to the English systems of law and equity; for it is preposterous to suppose that the colonies, forming a national government, just after they had achieved their independence in a war caused by the unjust laws of the mother country, wished to irrevocably adopt both her common law and equity systems, or either. It is true that the common law is the basis of the law in every State save Louisiana, but this does not prove that the United States has the same substratum of jurisprudence as the various States.

Certain powers are conferred upon the federal courts with the right to administer complete relief in all those cases, and it was never contemplated that in matters of State law and local policy there should be a uniform system of federal jurisprudence, either at law or equity. If this were so, the enumeration of granted powers has no effect, for the term, all cases in equity, extends to a large and indefinite class of cases, embracing the entire field of the then existing equity jurisprudence. To give such a construction to this clause would convert what was intended to be a limitation upon the power of the federal government into an extension of its power.

On the law side there would be a supreme and a concurrent jurisdiction, but on the equity side there would only be a supreme jurisdiction—supreme in the sense that in the matters commonly called concurrent, none of the equity rights, as existing in 1789, can be changed by the States, and, as to matters of exclusive federal jurisdiction, all cases in equity are necessarily supreme.

Whenever, according to this novel view, a man gets into a federal court of equity, he can insist upon his rights being adjudicated exactly as they would have been in equity, in 1789; but the question at once arises: In what equity—in which one of the thirteen distinct colonial systems?

No federal decision has ever held that there must be a uniform equity jurisprudence in the federal courts throughout the United States, and, had it not been that the meaning of jurisdiction has been unfortunately confounded with the meaning of jurisprudence, this question would never have perplexed any one.

The term jurisdiction, in its etymological signification, means the power to declare the law, and this signification corresponds closely to its accepted legal meaning. It has been defined briefly and clearly by the U. S. Supreme Court in the following words: "The power to hear and determine a case is jurisdiction." *U. S. vs. Arredondo et al.*, 6 Peters, 601, 709.

In this case the question was as to the power of a federal court of equity to take cognizance of a land claim arising in Florida, and to pass upon rights in reference thereto, which accrued under the laws of the Spanish government in force, prior to the acquisition of Florida by the United States. It was held that the court had jurisdiction—*i. e.*, the power to hear and determine this cause, but that the substantive rights in controversy must be controlled by the Spanish law.

Both the federal and State laws fix the jurisdiction of their respective courts, and, from time to time, change the jurisdiction of those courts. The power to hear and determine causes does not mean that the causes must always be determined in the same way, but simply that an adequate machinery has been provided to dispose of those causes. A criminal court would have the same jurisdiction though the statutes should prescribe that the same state of facts should, at one time, be murder, at another time, manslaughter, and, at another time, justifiable

homicide. A court of probate would have the same jurisdiction, though, at one time, the statute should require a will to be executed in the presence of five witnesses, and, at another time, in the presence of only two. A court of equity would have the same jurisdiction, though, at one time, the statute of registry should prescribe that a second mortgagee, with actual notice of a prior unrecorded mortgage, should take subject to that mortgage, and, at another time, that a second mortgagee, even with actual knowledge of a prior unrecorded mortgage, should not be affected thereby; though the law of assignments should, at one time, allow preferences, and, at another time, forbid them; though, at one time, the statute of frauds and perjuries should allow the specific performance of verbal contracts for the sale of real estate, and at another time, annul them; though, at one time, alimony should be allowed as an incident to a suit for separation from bed and board, and, at another time, forbidden; and though, at one time, a trust in favor of an unincorporated religious body should be denied (*e. g.* Mr. Minor's famous example, "The Baptist Association, that for common meets in Philadelphia"), and, at another time, enforced.

The Supreme Court of the United States has held repeatedly that in the assignment of a cause in a federal court to the law or the equity side thereof, the uniform test to be applied is: How would the cause have been allotted, in 1789? Whether it goes to the law or equity side is to be determined by the same criterion that obtained, in 1789, viz.: Was it then a matter of common law or equitable cognizance (*Mississippi Mills vs. Cohn*, 150 U. S. 202); but after the allotment has been made, the substantive rights are to be adjudicated according to the existing law of the State in which the case arose, when no federal question or question of general law is involved. The phrase, uniform equity jurisdiction, means neither more nor less than this, and no federal court has yet held that there must be a uniform equity jurisprudence in all the States, nor will there ever be such a decision under present constitutional restrictions.

II.

1.

It is now necessary to examine the authorities and see how far the principles, which we have attempted to deduce from the limited powers of the federal government, have been borne out in practice.

Pomeroy, in his great work on Equity Jurisprudence, says, in Vol. I Sec. 297, in discussing the substantive rules of law, applied by the federal equity courts in the various States:

"In order to prevent a misconception of the foregoing rules concerning the equitable jurisdiction of the national courts, there is one limitation which must be constantly borne in mind. Since the original jurisdiction of the United States courts, especially of the circuit courts, in large measure depends upon the State citizenship of the litigant parties as its sole basis, it follows that in some cases of ordinary con-

trousers—in all those which do not directly arise under statutes of Congress or provisions of the United States Constitution—the subject matter of the suit, the primary rights, interests or estates to be maintained and protected are created and regulated by State laws alone. While, therefore, it is correctly held that the equitable jurisdiction of the national courts, their power to entertain and decide equitable suits and to grant the remedies properly belonging to a court of equity, is wholly derived from the constitution and laws of the United States, and is utterly unabridged by any State legislation, yet, on the other hand, the *primary rights, interests and estates which are dealt with in such suits, and are protected by such remedies, are within the scope of State authority, and may be altered, enlarged or restricted by State laws.* The equitable jurisdiction of the national courts is not directly affected by the State statutes, but what may be finally accomplished by the exercise of that jurisdiction, what estates, property rights and other interests of the litigants may be maintained, enforced or enjoyed by its means, must depend to a great extent upon the policy of legislation adopted in each individual State.”

This is a true exposition of the rule, and the one upon which the federal courts have consistently acted. Pick up any volume of United States Supreme Court Reports and glance at the cases where the jurisdiction of the State and federal courts is concurrent, and not involving a matter of commercial law or of general jurisprudence. The first question in substantially every case is: What is the State law? A matter ceases to be a matter of general commercial law, or of general jurisprudence, just as soon as a State legislates upon that particular subject, and the federal courts, no matter whether, prior to the enactment of the statute, their view of the law agreed or disagreed with that of the State courts, are bound, thereafter, to follow the authoritative exposition of the State statute by its highest court. Nor does it follow that a matter is a matter of general jurisprudence simply because there is no State statute on that subject. In its nature it may be a matter of local policy, which can and must be regulated by the decisions of each State, and then the federal courts must follow the State decisions.

The effect of State laws and decisions upon the federal courts was carefully considered in the leading case of *Burgess vs. Seligman*, 107 U. S., p. 20, a common law case, and the rule upon this subject was restated after the review of fifty United States Supreme Court decisions, many of which were equity cases. The sources of the rule, the irresistible logic of *in consimili casu* of law and equity in the federal courts so far as obedience to State laws is concerned, and its applications by the federal courts, make it certain that it was intended to be a guide, both in common law and equity cases.

On pp. 33 and 34, the Court say:

“The existence of two co-ordinate jurisdictions in the same territory

is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. * * * As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail" (see Note 1).

This case has been affirmed in *Pana vs. Bowles*, 107 U. S., p. 541. where the Court say: "See also *Burgess vs. Seligman*, *ante*, p. 20. where the question how far the courts of the United States are bound by the decisions of the State courts is carefully re-examined and the rules on the subject stated with precision." And in the following cases: *Carroll Co. vs. Smith*, 111 U. S., p. 563; *Anderson vs. Santa Anna*, 116 U. S. 362; *Bolles vs. Brimfield*, 120 U. S. 764; *Folsom vs. Township Ninety-six*, 159 U. S. 625. See also *Cooley's Con. Lim.* (6th Edition), pp. 20, 21 and 22 and notes.

Federal courts always follow, in accordance with the above stated rule, the State laws and decisions governing descents, fraudulent assignments, taxation, limitation, frauds and perjuries, assignments for benefit of creditors, what the Supreme Court of the United States designates as "rules of property," and many other statutes and decisions, all of which are different in every State. As to assignments, see *South Branch Lumber Company vs. Ott*, 142 U. S., p. 628, an equity case, where the Court say: "The question of the construction and effect of a statute of a State regulating assignments for the benefit of creditors is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority in the courts of the United States." This is an affirmation in the same words of what is said in the case of the *Chicago Union Bank vs. the Bank of Kansas City*, 136 U. S., p. 235, an equity case. In 148 U. S., *May vs. Tenney*, also an equity case, on pp. 64 and 65, the Court say:

"The decision in *White vs. Cotzhausen*, 129 U. S. 329, construing a similar statute of Illinois in accordance with the decision of the Supreme Court of that State, as understood by this court, has, therefore,

no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different States is immaterial. As observed by Mr. Justice Field, speaking for this court: 'The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the Legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other.' *Christy vs. Pridgeon*, 4 Wall. 196, 203; see also *Detroit vs. Osborne*, 135 U. S. 492."

How is it possible, if the position of the learned judge *a quo* be correct, for a federal court of equity to recognize assignments with preferences in one State, where they are allowed, and assignments without preferences in another State where they are forbidden?

This is certainly not uniform equity jurisdiction in the sense that its rules must be exactly the same in all the States. The Louisiana law regulates preferences, and the case at bar comes within its provisions on this subject.

Even the admiralty laws, an exclusive branch of federal jurisdiction, vary in the several States, because the admiralty courts, under certain restrictions, enforce liens created by the State laws, and yet admiralty jurisdiction is the same in all the States. In the much quoted case of *The Bank of Augusta vs. Earle*, 13 Peters, 519, it was argued that the contract was contrary to the policy of the laws of Alabama, and, therefore, could not be enforced. On page 537 the court say:

"When the policy of a State is thus manifest the courts of the United States would be bound to notice it as a part of its code of laws, and to declare all contracts in the State repugnant to it to be illegal and void."

A fortiori does this reasoning apply, when a contract, like the one attempted to be set up by the intervenors, is impossible under the State laws.

So anxious are the federal courts to conform to the substantive rules of law of the various States, that the Supreme Court has held in three cases, *Green vs. Neal's Lessee*, 6 Peters, 291, in which the necessity for such conformity is elaborately and convincingly discussed, *Suydam vs. Williamson*, 24 How. 427, and *Leffingwell vs. Warren*, 2 Black, 600, that it will follow the settled laws of property in any State, although it may be thereby required to overrule its own decisions, which, when rendered, were in accordance with the decisions of the State courts at that time. So it appears that the Supreme Court has no pride of opinion, when the rights of the citizens of a State demand that the rules of property, as administered in the concurrent jurisdictions, shall be the same.

In the case of *Barrow vs. Milliken*, 74 F. R. 612, decided, one year ago, by the same court, which certified the instant case, an equitable lien was allowed, and the learned judge *a quo* stated in his written

opinion that that case was decisive of this one. The fact that the judges of the Circuit Court of Appeals have doubted their own decision by certifying the same question to this court is strongly persuasive of the fact that they wish to invoke the aid of this court as a convenient means of discarding error. In *Green vs. Neal's Lessee*, *supra*, the court said: "That it would be a strange perversion of principle if the judicial exposition of State laws by State tribunals could be disregarded by the federal courts."

2.

The bill of complaint in this case alleges that the defendant corporation is insolvent, and asks that a receiver may be appointed in order to effect a ratable distribution of the defendant's assets. The answer filed by the defendant company admits its insolvency and unites in the prayer of the bill. Thus, the object of the appointment of a receiver in this cause was to effect the same result that would have been attained by a liquidation under the State law.

Independently of any proof of insolvency, Arts. 3183 and 3184 of the Civil Code require a ratable distribution of the debtor's property. These articles are simply an expression of the fundamental principle of all systems of insolvency law. There is, therefore, but one question in the case, and that is, whether a ratable distribution of the defendant's property is binding upon this court, unless lawful preferences, recognized by the State law, can be established. This question, like every other question of federal authority, can be determined only by a reference to the federal constitution and the decisions construing it, and by this chart we must be guided. The discussion of the constitutionality of State insolvency laws is, in our opinion, strictly analogous to the question at issue.

One of the enumerated powers of Congress is the right to establish a uniform law of bankruptcy, and, in the actual exercise of this power, it may override the lien laws enacted by the various States. Now, it is a well settled rule of construction, that the grant of a power in an instrument, designed to confer limited powers, is an implied exclusion of other powers of a similar nature. Therefore, Congress is the sole branch of the federal government empowered to annul the State lien laws, and if Congress does not exercise its power, it is competent to the States to establish laws of insolvency, and to regulate priorities, when there are no insolvency laws. The contention at bar is that State lien laws are not only subject to the supremacy of a national bankrupt act, but also to the imputed power of a federal chancellor to declare any State lien law unconstitutional when it comes in conflict with an equitable doctrine, prevailing in 1789.

Early in the history of our government, the question arose as to the power of the States to enact insolvency laws, and Chief Justice **Marshall**, in the famous case of *Sturges vs. Crowninshield*, 4 Wheat. 122,

held that the grant to Congress of the power to establish uniform bankruptcy laws was not incompatible with the passage of insolvency laws by the States, not impairing the obligation of contracts, when Congress had declined to exercise its power. This case has become one of the landmarks in federal jurisprudence, and has been reviewed and affirmed a score of times. It follows that, if the States have the constitutional right to enact insolvency laws, the federal courts must enforce these laws, and allow or deny liens for exactly the same causes that would be recognized in the State courts. It is needless to quote many federal decisions in support of a proposition which none will deny, but see *Ogden vs. Saunders*, 12 Wheat. 213, where the subject of State insolvency laws is discussed in many phases; *Boyle vs. Zacharie*, 6 Pet. 348; *Baldwin vs. Hale*, 1 Wall. 228; *Gilman vs. Lockwood*, 4 Wall. 409; *Cole vs. Cunningham*, 133 U. S. 114; in *Brown vs. Smart*, 145 U. S. 457, the court say :

“The principles which underlie this case are clearly established by the decisions of this court. So long as there is no national bankrupt act, each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a State can not by such a law discharge one of its own citizens from his contracts with citizens of other States, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. *Sturges vs. Crowninshield*, 4 Wheat. 122; *Ogden vs. Saunders*, 12 Wheat. 213; *Baldwin vs. Hale*, 1 Wall. 223; *Gilman vs. Lockwood*, 4 Wall. 409. YET EACH STATE, SO LONG AS IT DOES NOT IMPAIR THE OBLIGATION OF ANY CONTRACT, HAS THE POWER BY GENERAL LAWS TO REGULATE THE CONVEYANCE AND DISPOSITION OF ALL PROPERTY, PERSONAL OR REAL, WITHIN ITS LIMITS AND JURISDICTION. *Smith vs. Union Bank*, 5 Pet. 518, 526; *Crapo vs. Kelly*, 16 Wall. 610, 630; *Denny vs. Bennett*, 128 U. S. 489, 498; *Walworth vs. Harris*, 129 U. S. 355; *Geilinger vs. Philippi*, 133 U. S. 246, 257; *Pullman Palace Car Company vs. Pennsylvania*, 141 U. S. 18, 22.”

Brown vs. Smart, and many other Supreme Court cases, were cited in *Butler vs. Goreley*, 146 U. S. 313, in support of the proposition that there is no force in the position that a State insolvency law is unconstitutional.

All the foregoing cases are valuable because they show that in each instance the federal courts enforce the State law of liens exactly as they find it, and they all, by implication, necessarily and emphatically negative the idea that there is such a thing as a uniform system of federal equity jurisprudence, or that there is one set of liens in the State and another in the federal courts. We have quoted the equity cases of *Chicago Union Bank vs. Bank of Kansas City*, 136 U. S. 235; *South Branch Lumber Company vs. Ott*, 142 U. S. 628, and *May vs. Tenney*, 148 U. S. 64, in each one of which the federal courts followed

the assignment law of the various States in which the cases arose, and pointed out that this was not uniform equity jurisdiction (*i. e.*, jurisprudence). It is hardly necessary to add that assignment laws and insolvency laws both have the same object in view—the distribution of a debtor's assets, though the means prescribed are different.

In *Bamberger vs. Schoolfield*, 160 U. S. 149, the Court, through Mr. Justice White, again affirmed the rule enunciated in *Chicago Union Bank vs. Bank of Kansas City*, *supra*, and in that case enforced a preference allowed under the Alabama law. It was expressly decided in *Tua vs. Carrière*, 117 U. S. 201, appealed from the Circuit Court of the United States for the Eastern District of Louisiana, and affirmed, that the insolvent laws of Louisiana are in force, and this decision was followed in *Shwartz et al. vs. H. B. Claflin Company*, 60 F. R. 676. In both these cases attachments in the federal court were dissolved by a cession in the State Court. It can hardly be questioned that a receivership of an insolvent corporation in a federal court is equivalent to a liquidation of an insolvent corporation in a State Court, and there should be the same result reached in both courts in the distribution of assets.

It is a work of supererogation to cite more federal cases, holding that State lien laws, as applied to insolvency proceedings, assignment laws, to the distribution of a decedent's assets and to all other subjects, are binding upon the federal courts both of law and equity, but, recognizing the vast importance of principle involved in this case, we desire to quote the following cases to show how inflexibly the rule has been applied. The syllabus of *Smith vs. Union Bank of Georgetown*, 5 Pet. 518, is:

"The right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract, or of the domicile of the deceased, and, therefore, where administration was taken under the laws of Maryland, of assets there, where all debts are of equal dignity and the intestate was domiciled, and owed a bond debt in Virginia, where bond debts have a preference, held, that the bond debt had no prior right of payment out of the assets in Maryland."

In *Marbury vs. Kentucky Union Land Company*, 62 Federal Reporter, page 353, decided by the Circuit Court of Appeals for the Sixth Circuit, the Court say:

"The last question for our consideration is whether the distribution of the estate of the land company shall be according to the ordinary equitable rule, or in accordance with the Kentucky statute which governs the distribution of the estates of the deceased insolvents."

After a full discussion of the subject, the Court further say:

"The distribution of the land company's estate should be, therefore, in accordance with the rule prescribed by Sec. 35, Art. 2 of chapter 39 of the general statutes of Kentucky, concerning estates of decedents" (page 356).

In *Etheridge vs. Sperry*, 139 U. S., pages 276-7, the Court say:

“While chattel mortgages are instruments of general use, each State has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, a matter of State regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several States, but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages, that this Court will accept the settled law of each State as decisive in respect to any case arising therein. *Chicago Bank vs. Kansas City Bank*, 136 U. S. 223.”

This decision announces the doctrine that the States can regulate the disposition and conveyance of personal property in the most emphatic manner, which is an affirmation in part of the more extensive rule quoted in *Brown vs. Smart*, *supra*.

We come now to the important case of *Brine vs. Insurance Company*, 96 U. S., p. 630, in which the opinion was delivered by Mr. Justice Miller, that great expounder of constitutional law. The present Chief Justice of the United States Supreme Court represented the appellants, and succeeded in reversing the lower Court. The question there at issue was as to the binding effect of the Illinois statutes regulating the foreclosure of a mortgage, upon a federal court of equity sitting in that State. The Court held that these statutes were binding upon the federal court, and that all private contracts are made with special reference to the laws of the place where they are made and to be performed, and that these laws are incorporated into the contract. Applying these principles to the instant case, appellees' contract was made subject to the law of Louisiana, by which an equitable lien is expressly excluded. In *Brine vs. Insurance Company* it was urged that the federal equity practice must be uniform in all the States, and the inference was drawn that federal equity jurisprudence must be uniform. Mr. Justice Miller said that no federal decision had held that equity courts could deny substantial rights conferred by State statutes. We do not believe in quoting copious extracts from opinions, but think that the importance of the principle involved in the present case justifies us in departing from the rule, when a leading case bears so closely upon the discussion and presents the subject in such a lucid way, especially in view of the fact that appellees' present contention is reviewed.

On pp. 633-4 the Court say:

“It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Courts as they existed, prior to

the declaration of independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the circuit courts for their own guidance. And treating all the proceedings subsequent to a decree, which are necessary for its enforcement, as a matter of practice and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale, on the rights acquired by the purchaser and those of the mortgagor, and his subsequent grantees, are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned.

“On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by, the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract. And that all the laws of a State, existing at the time a mortgage, or any other contract, is made which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

“We are of opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from State control of the chancery practice of the federal courts, as regards mere modes of procedure they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form.

“Let us see if the statutes of Illinois on this subject do confer positive and substantial rights in this matter” (page 634).

“It is not denied that in suits for foreclosure in the courts of that State the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts.

“Nor is it pretended that this court, or any other federal court, can

in such case review a decree of the State court which gives the right to redeem.' This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right. *Olcott vs. Bynum et al.*, 17 Wall. 44; *Ex parte McNeil*, 13 Ib. 236 (p. 635).

"But there is another view of the question which is equally forcible, and which leads to the same result. All contracts between private parties are made with reference to the law of the place where they are made, or are to be performed. Their construction, validity, and effect, are governed by the place where they are made and are to be performed, if that be the same as it is in this case. It is, therefore, said that these laws enter into and become part of the contract" (page 637).

"We are not insensible to the fact that the industry of counsel has been rewarded by finding cases, even in this court, in which the proposition that the rules of practice of the federal courts in suits in equity can not be controlled by the laws of the States, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a State, or to add to or take from a contract that which is made a part of it by the law of the State, except where the law impairs the obligation of a contract previously made. And we are of opinion that Mr. Chief Justice Taney expressed truly the sentiment of the court as it was organized in the case of *Bronson vs. Kinzie*, as it is organized now, and as the law of the case is, when he said that 'all future contracts would be subject to such provisions, and they would be obligatory upon the parties in the courts of the United States, as well as those of the States'" (page 639).

Mr. Justice Miller quotes approvingly an opinion of Mr. Chief Justice Taney in the extract just given, and we now desire to give an excerpt from an opinion of that eminent Chief Justice on circuit, in Maryland, which settles this question of the obligation of federal courts of equity to follow the State law in matters of local policy, so far as unanswerable logic can settle anything.

The decision places the law upon that solid foundation of common sense and justice from which it can never be dislodged. We ask the attention of the court to the argument of counsel for the complainant in that case because he pinned his faith to some of the same cases, upon which counsel for appellees in this case rely. In that case the complainant attempted to enforce a bequest in favor of a vague charity,

and the court held that it was bound to follow the Maryland decisions, which had held such a bequest void.

“ The circuit courts of the United States administer the laws of the States in which they sit, unless those laws are in conflict with the constitution of the United States, treaties or acts of Congress; and, as a general rule, regard the decisions of the highest judicial tribunals of the State as conclusive evidence of the law. We do not speak of matters of practice, or the forms of proceeding; but of decisions upon the right or claim in dispute between the parties, where that right depends upon the laws of the particular State.

The cases of *Swift vs. Tyson*, 16 Pet. (41 U. S.) 1, and *Carpenter vs. Providence Ins. Co.*, *Id.* 511, 512, were cases depending upon the usage of commerce, and the general principles of commercial law. And the Supreme Court have always said that in cases of that description, where the State court does not decide the case upon any particular law of the State or established local usage, but upon the general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive evidence of the commercial law of the State, and will not be followed as such by the Supreme Court. And the reason of this distinction is obvious. The State court does not decide in such cases upon the peculiar laws and institutions of the State. Its decision, therefore, is no evidence that any law has been adopted by the State in conflict with the general principles which regulate commercial contracts throughout the commercial world.

So, too, as relates to the jurisdiction of the circuit court sitting as a court of chancery. It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity, as recognized in the jurisprudence of England, is to be observed in the courts of the United States in administering the remedy for an existing right. *The rule applies to the remedy and not to the right; and it does not follow, that every right given by the English law, and which, at the time the constitution was adopted, might have been enforced in a court of chancery, can also be enforced in a court of the United States; the right must be given by the law of the State, or of the United States. It is the form of remedy for which the constitution provides; and if a complainant has no right, the circuit court, sitting as a court of chancery, has nothing to remedy in any form of proceeding.*

In the case before the court the question is: Is the bequest which the complainants claim a valid one by the laws of Maryland? It is a question which, in its nature, necessarily depends upon the laws of the respective States. Some of the States sanction devices of this description; some do not, and undoubtedly it depends upon every State to determine for itself, *to whom and in what form, and by what instrument,*

any property within its borders may pass by devise or otherwise. The court of appeals in Maryland have decided that a bequest like this is void by the laws of the State and passes no right to any one. This court is bound to respect this as the law of the State, and if there is no right vested in the complainants by this bequest, this court can not create one. There is, therefore, neither an equitable nor legal title upon which the powers of a court of the United States can be called into action, either as a court of equity or of law, in behalf of these complainants.

This is not a proceeding to appoint a trustee to execute a valid trust, nor, indeed, are there any *cestuis que trustent*. This doctrine is fully maintained in the case of *Wheeler vs. Smith*, 9 How. (50 U. S.) 55, which was decided at the last term of the Supreme Court. The cases of *Trustees of Philadelphia Baptist Association vs. Hart's Executors*, and *Vidal vs. Girard's Executors*, were in that case recognized as depending upon the laws of the respective States, and not merely upon the doctrines of the English chancery. The bill in this case must, therefore, be dismissed with costs." *Meade vs. Beale*, F. C., Vol. 16, Case No. 9371, p. 1283.

Fortunately, we are not left to conjecture whether the free grace of a federal chancellor, by the potent magic of an equitable lien, can convert an imperfect pledge, under the Louisiana law, into a perfect pledge, because this question has been set at rest by the Supreme Court of the United States, in the case of *Casey vs. Cavaroc*, 93 U. S. 467, a case involving exactly the same questions as the one at bar, which went up from the circuit court of the United States for the District of Louisiana. In that case, the receiver of an insolvent bank filed a bill in equity in the federal court to recover some securities which the bank, prior to receivership, had attempted to pledge, on the ground that the pledge was imperfect and conferred no right on the pledgee as against the other creditors of the bank. The circuit court dismissed the bill and the receiver appealed and reversed the lower court. The Supreme Court reviewed the Louisiana law of pledge at great length and the decisions thereunder, and concluded that the pledge was defective under the Louisiana law, and, therefore, could not be recognized in the federal court, by which law that court was governed.

It was urged in the argument that a similar pledge had been sustained by the Supreme Court itself in a case, going up from New York, *Clarke vs. Iselin*, 21 Wall. 360, and that that decision was binding upon the court. The court stated in its opinion that the New York case was governed by New York law, where such a pledge was valid, but that the case at bar was controlled by Louisiana law, where such a pledge was invalid. In *Casey vs. Cavaroc*, the pledgee, recognizing, as the pledgee does in this case, that he could get no comfort from Louisiana law, invoked the power of equity to save him, but equity mocked at him, and said, in effect: "Shall I, in a matter of State law and local

policy, recognize rights which are denied to you by the State courts?" On page 491, the court say:

"These considerations also supply an answer to another suggestion, that equity will consider as done what the parties intended should be done, which, it is assumed, was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in the view of the law, been incurred in this case, and such rights have, by the express letter of the law, accrued."

In the case at bar all the creditors regarded the sugar bounty as a common fund, and their rights certainly accrued to subject it. The court will observe the exact parallel between this case and the case at bar. In both cases there are insolvent corporations; in both cases a pledge is attempted prior to insolvency, which is invalid under the Louisiana law; in both cases equity is called upon to perfect the pledge; in one case equity declined to interfere, and if experience and reason be any guide, it will also decline to interfere in this case.

Casey vs. Cavaroc was a much stronger case for equitable intervention than the present one; for, in that case, nearly all the elements of a legal pledge existed.

Appellee's counsel attempts to distinguish between an executed and an executory contract and claims that a mere promise, though unaccompanied by a transfer or an assignment, will invest a court of equity with power to transform inchoate rights into perfect equitable rights, and to enforce them by appropriate equitable remedies, while an attempted execution of the contract by the parties themselves places them beyond the sustaining grasp of the chancellor's hand. Upon this principle equity will not help those who try to help themselves, but extends its favors solely to those who promise and do nothing, which is contrary to one of its maxims—"*Vigilantibus non dormientibus equitas subvenit.*"

If, according to this reasoning, in the case of *Casey vs. Cavaroc*, 96 U. S. 467, the bank had promised to pledge its securities to the Credit Mobilier, instead of actually attempting to pledge them, the Credit Mobilier would have had an indefeasible right to them as against all the other creditors of the insolvent bank.

Casey vs. Cavaroc was followed in *Bidstrup vs. Thompson*, 45 F. R., p. 454, a case decided by the circuit court for the Eastern District of Louisiana. In that case the Louisiana law of pledge was applied.

If the so-called doctrine of an equitable lien is held to apply to the instant case, then it is true that the insolvency laws of Louisiana, and the other States, to the extent that they govern preferences, can always be defeated, where one creditor can get the common debtor to make him a promise, of which a federal court of equity will take cogni-

zance, to devote a portion of his assets to the payment of his specific debt. Surely this court must recoil from such a consequence.

We invite the attention of the court to the following equity cases, in each of which the State law was followed:

State Railroad Tax Cases, 92 U. S., pp. 575, 617.

Van Rensselaer vs. Kearney, 18 U. S., pp. 631, 636 (11 How. 297).

Carroll vs. Safford, 15 U. S., p. 509 (3 How. 441).

Nesmith vs. Sheldon, 17 U. S., p. 417 (7 How. 812).

Beauregard vs. City of New Orleans, 18 How. 497 and 502 (1 Miller, 422).

Davie vs. Briggs, 97 U. S. 628.

Elmendorf vs. Taylor, 6 U. S. 360 (10 Wheat. 152). Opinion delivered by Chief Justice Marshall.

Ridings vs. Johnson, 128 U. S. 212.

Mellen vs. Buckner, 139 U. S. 388.

New Orleans Bank vs. LeBreton, 120 U. S. 765.

The cases of Beauregard vs. City of New Orleans, New Orleans Bank vs. LeBreton, Ridings vs. Johnson, and Mellen vs. Buckner, *supra*, went up from Louisiana, and in all these cases a federal court of equity enforced the Louisiana law exactly as it found it.

See also New Orleans Waterworks Co. vs. Southern Brewery Co., 36 F. R. 833, where the doctrine was applied in a novel but correct manner.

3.

It has long been settled that a man neither gains nor loses anything by going into a federal court in matters of concurrent jurisdiction involving questions of local law and State policy, and in support of this proposition we quote the following extract from *Ex parte McNeil*, 13 Wall. 243, which is also valuable because it explodes the notion that jurisdiction is jurisprudence:

"It is urged further that a State law could not give *jurisdiction* to the District Court. This is true. A State law can not give *jurisdiction* to any federal court; *but that is not a question in this case*. A State law may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction that exists already, and it is invoked to give effect to the right by applying the appropriate remedy. THIS PRINCIPLE MAY BE LAID DOWN AS AXIOMATIC IN OUR NATIONAL JURISPRUDENCE. A PARTY FORFEITS NOTHING BY GOING INTO A FEDERAL TRIBUNAL. JURISDICTION HAVING ATTACHED, HIS CASE IS TRIED THERE UPON THE SAME PRINCIPLES, AND ITS DETERMINATION IS GOVERNED BY THE SAME CONSIDERATIONS, AS IF IT HAD

BEEN BROUGHT IN THE PROPER STATE TRIBUNAL OF THE SAME LOCALITY. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction."

This case was affirmed in *Cowley vs. Northern Pacific Railroad Co.*, 159 U. S. 583, where the court say, after discussing the meaning of equitable jurisdiction:

"It was also said in *Davis vs. Gray*, 16 Wall. 203, 231, that 'A PARTY BY GOING INTO A NATIONAL COURT DOES NOT LOSE ANY RIGHT OR APPROPRIATE REMEDY OF WHICH HE MIGHT HAVE AVAILED HIMSELF IN THE STATE COURTS OF THE SAME LOCALITY. THE WISE POLICY OF THE CONSTITUTION GIVES HIM A CHOICE OF TRIBUNALS.'" Other cases to the same effect are *Holland vs. Challen*, 110 U. S. 15; *Marshall vs. Holmes*, 141 U. S. 589; *Johnson vs. Waters*, 111 U. S. 640; *Arrowsmith vs. Gleason*, 129 U. S. 86.

Should appellees' contention be sustained, they will, by a mere choice of a federal tribunal, have deprived appellants of their undoubted right in the State courts to participate ratably in the distribution of the fund.

In *Lippincott vs. Mitchell*, 94 U. S. 770, the court say:

"This construction is a rule of property of the State, and we are as much bound by it as if it were a part of the statute. IT IS OUR DUTY TO APPLY THE LAW OF THE STATE AS IF WE WERE SITTING THERE AS A LOCAL COURT, AND THIS CASE WERE BEFORE US AS SUCH A TRIBUNAL." Citing, *Leffingwell vs. Warren*, 2 Black, 599; *Olcott vs. Bynum*, 17 Wall. 44.

In *Daniels vs. Case*, 45 F. R. 845, the court, after forcibly discussing the binding effect of State statutes and decisions upon federal courts, say:

"The plaintiff, because of residing on the west side of Kaw river, with the right to sue in the United States Circuit Court, would have a good tax title, while a citizen of Missouri, on the east side of the river, would have no title. *The public sense of justice would challenge to the death any such rule of inequality.*"

III.

We now wish to briefly review some of the authorities, relied upon by appellees.

It is well to bear in mind in the examination of cases the following principle, enunciated by the Circuit Court of Appeals for the Eighth Circuit, in the *United States vs. Trans-Missouri Freight Association*, 58 F. R. 73: "But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated." In the noted case of *Cohens vs. Virginia*, 6 Wheat. 264, 339, Chief Justice

Marshall said with his customary force: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Also see Wambaugh's *The Study of Cases*, Chap. II. Applying this principle, the cases cited can not control this case, unless the point actually decided was that there must be a uniform federal equity jurisprudence, not jurisdiction, and that substantive rights, denied by the State statutes, are allowed in federal courts of equity. In not one of the cited cases was this held, and, therefore, they are not authorities to sustain appellees' contention.

The earliest case on the subject is *Robinson vs. Campbell*, 3 Wheat. 212. One of the points in that case was whether an equitable title could be set up as a defence in an action of ejectment, and the court held that it could not be, no matter what the State practice was. The syllabus correctly expresses the decision on this point:

"To determine whether there is plain, adequate and complete remedy at law, so as to prevent a resort to the equitable powers of the courts of the United States, reference must be had to the principles of the common law of England, and not to the laws of the State where the Court sits.

"If the State laws have given a legal remedy founded on an equitable title, the equity jurisdiction of the circuit court is not affected thereby."

The next case is *United States vs. Howland*, 4 Wheat. 108.

In this case it appears that the United States filed a bill of equity in the Federal Circuit Court for Massachusetts to recover money due for duties. The defendants demurred on the ground that the case was not one of equitable cognizance, as a statute of Massachusetts gave the government the right to proceed at law in such cases. The lower court sustained the demurrer and dismissed the bill, but the Supreme Court held, that under the facts of the case a trust existed, and an accounting would be required, so that the case was, on general principles, one of equitable cognizance, and that the State law could not vary the jurisdiction in the federal court. The case was remanded to be proceeded with in equity. This decision, therefore, simply announces the proposition, that whether a case shall be proceeded with at law or in equity in the federal courts depends on general principles governing the allotment of causes to the law or equity side, prevailing at the time of the adoption of the federal constitution, and not on State legislation. The expressions used by Chief Justice Marshall must be understood with reference to the point he was deciding.

In the case of *Neves vs. Scott*, 13 How. 270, two questions of general equity jurisprudence were presented, one as to the nature of an executed trust, the other as to who were volunteers. The court say: "No question has arisen concerning ANY STATUTE LAW OF GEORGIA, nor was it then, nor is it now, suggested that any word, or phrase, or provision of the articles, should bear any peculiar or technical meaning, by reason of any local law or custom." In that case it was urged that a decision of the Supreme Court of Georgia in a similar case was binding upon the Supreme Court, but the court held that both courts in a matter of that nature resorted to the decisions of the English High Court of Chancery, and that the decision of the Georgia court was not binding upon it.

In the case of *Fitch vs. Creighton*, 24 How. 160, the question at issue was as to the form of procedure, and the court held that according to the principles governing the allotment of causes in the federal courts, it was a proper case for equitable relief, and that State statutes could not change the nature of federal remedies.

The next case is *Payne vs. Hook*, 7 Wall. 425. In that case a bill in equity was filed by a citizen of Virginia against the Public Administrator of Calloway county, Mo., to obtain a distributive share in an intestate estate. A demurrer was filed on the ground that under a Missouri statute a State chancery court would have no jurisdiction in such a case, because this branch of equitable jurisdiction had been confided to a special probate court. The court held that the bill stated a proper case for equitable relief, according to the principles, obtaining in 1789, and that a federal court of equity did not follow the allotment in State courts, when the assignment there conflicted with its fundamental principle of allotment. The lower court sustained the demurrer, but the Supreme Court reversed its decision. The right existed both in the State and federal courts, and it was simply a question as to the forum in which this right should be litigated. Had the demurrer been sustained, this absurdity would have resulted. The right, sought to be enforced, was equitable, not common law; hence, if equity had no jurisdiction, a litigant with an indisputable right could have had no relief in the federal court, since in that court all suits must be allotted to either the common law or equity side. This would have been another of those anomalous cases, which are a standing reproach to the law—a right and no remedy.

In the case of *Fletcher vs. Morey*, Federal Cases, No. 4864, an equitable lien was enforced in Massachusetts. The court held that the agreement creating the lien was valid between the parties and not prohibited by the laws of Massachusetts, and that the lien could be enforced under the general equity jurisdiction of a federal court *as well as under its particular jurisdiction, conferred by the Bankrupt Act of 1841, C. G. Sec. 8*, thus placing its jurisdiction upon a double ground. The court said that it had yet to learn that no equitable lien could exist in Massachusetts, though it was true that no remedy (statutory evi-

dently) had been provided for its enforcement in the State courts. By reference to Jones on Liens, Vol. 1, Sec. 30, it will be seen that equitable liens are enforced in the Massachusetts State courts. But is this case authority for the proposition that a right, denied in the State court, must be enforced in a federal court of equity?

The learned judge *a quo*, in his written opinion, lays great stress upon the decision in Kirby vs. Lake Shore Railroad Company, 120 U. S. 130. In that case, an equity case, the only question was as to the time from which the statute of prescription ran in bar of suit, and extinctive prescription is the loss of a remedy.

The case went up from New York, and it was argued that the federal court must adopt the New York statute of limitations, as construed by its highest courts, which was contrary, so it was stated in argument, to the uniform practice in the federal courts of equity, determined by numerous federal decisions. The court held that the construction of the New York statute was *doubtful*; that its equity jurisdiction must be uniform in the several States, and that it could not change its long established rule, which was based upon an ancient equity principle. The point decided was that "it is an established rule of equity, as administered in the courts of the United States, that where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered" (p. 136).

This case decided no more and no less, and certain it is that the decision was not contrary to the State statute, since its construction was doubtful.

In the case of Wagner vs. Baird, 7 How. 255, 258, the court say: "In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation, which govern courts of law in like cases; and this rather in obedience to the statutes than by analogy."

In Godden vs. Kimmell, 99 U. S. 201, the court say: "Statutes of limitation form part of the legislation of every government, and are everywhere regarded as conducive and even necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in controversies of concurrent jurisdiction, they are equally obligatory in both forums, as a means of promoting uniformity of decision;" and, on page 210, the above passage from Wagner vs. Baird is quoted with approval.

In Metropolitan Bank vs. St. Louis Dispatch Company, 149 U. S. 436, 448, the court say: "Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern action at law;" citing Godden vs. Kimmell.

(In Baker vs. Cummings, 169 U. S. 189, 206, the court quoted with approval the above sentence from the Metropolitan Bank vs. St. Louis Dispatch Company.)

In the light of these decisions argument is unnecessary to prove that federal courts of equity, in cases of concurrent jurisdiction, are bound by State statutes of limitation, and in the case of *Kirby vs. Lake Shore Railroad Company*, the court, on page 138, announced, as settled law, the proposition of the above cases. The confusion caused by this case, as by many others, has arisen from failing to discriminate between the point actually decided and mere *obiter dicta*. If this case can be construed as meaning that federal courts of equity in matters of substantive law and concurrent jurisdiction are not controlled by State laws, it is in direct conflict with *Brine vs. Insurance Company*, 96 U. 630, *Meade vs. Beale*, F. C., Vol. 16, Case No. 9371, and *Brown vs. Smart*, 145 U. S. 454, and a host of other United States Supreme Court decisions, quoted *supra*, which are a necessary deduction from the limitations of the federal constitution upon federal courts.

In the case of *Gordon vs. Hobart*, F. C., No. 5609, another equity case, it was argued that, under the facts of that case, the plaintiffs had a remedy at law under the State law, and, therefore, could not go into a federal court of equity. The court held very properly that the federal equity jurisdiction must be uniform, and that the fact that the remedy in the State court was at law did not prevent federal equity jurisdiction from attaching. In the present case it must never be forgotten that there is no right and, of course, no remedy in the State courts, and that the burden of appellees' song to this court is, "Create us a right and give us a remedy."

The case of *Wheeler vs. Insurance Company*, 101 U. S., p. 439, which is confidently asserted to have silenced our contention, simply holds that the lien, there claimed, is recognized by the Louisiana Code and Louisiana decisions, and must be admitted in a federal court of equity. No one can be found to gainsay this indisputable proposition, assuming that the premise about the Louisiana law was correct, but how is it an authority for the exactly contrary position that a right, unknown and denied in Louisiana courts, must still be enforced in a federal court of equity? From what source do federal courts of equity derive the power to trample upon State laws, enacted in pursuance of their reserved rights, guaranteed by the federal constitution?

In the case of *Riddle vs. Hudgins*, 7 U. S. C. C. A. Reports, p. 335, (58 F. R. p. 490) *Hudgins & Bro.* sold a drove of cattle to *Nichols*, in Arkansas, and it was verbally agreed that the seller should have an express lien on the cattle for the unpaid purchase price. *Nichols* removed the cattle to the Choctaw Nation, in Indian Territory, and there died. His administrator took possession of over half the cattle, and upon demand, made by *Hudgins & Bro.*, refused to surrender the cattle or to pay for them. No other creditor of the decedent claimed them, and upon a bill filed in the federal court by *Hudgins & Bro.*, it was decided that they had a lien on the cattle to secure their debt.

There is nothing in the record to show that this decision was contrary

to a positive statute, and therefore, this case is no authority for the contention at bar, which is, that a so-called equitable lien can override an express State statute. This case went up from Indian Territory, where a territorial government existed.

In the case of *Mississippi Mills vs. Cohn*, 150 U. S. 202, it was held that the JURISDICTION (not jurisprudence) of federal courts, sitting as courts of equity, can not be enlarged or diminished by State legislation; and that whether a federal court of equity has jurisdiction over a particular case will be determined by inquiring whether by the principles of common law and equity, as distinguished and defined in this country and the mother country, at the time of the adoption of the federal constitution, the relief sought in the bill was one obtainable in a court of law, or one which only a court of equity was fully competent to give. In that case, a creditor's bill in a federal court of equity was maintained, though the remedy in the State courts was at law.

At this point it would be, perhaps, well to state that, while it is true that federal courts of equity enforce equitable liens in many of the States, it is also true that in all those States, State courts may, or do, enforce similar liens, and we challenge the learned counsel for the appellees to cite a single federal authority holding that a federal court of equity can enforce an equitable lien in direct contravention of a State law, not in conflict with the federal constitution or laws.

IV.

A pledge is a right, not a remedy, and is so defined by juriconsults. Markby's *Elements of Law*, Ch. XI; Sohn's *Institutes of Roman Law*, Sec. 59; Holland's *Elements of Jurisprudence*, pp. 201-2.

The latter, in his classification of rights, speaks (p. 148) of it as a private, substantive, normal, antecedent right *in rem*, and it can not be seriously contended that a pledge is one of the equitable remedies, which the federal constitution and laws are supposed to have stereotyped.

V.

Assume, for the sake of argument, that the constitution did adopt a uniform system of federal equity jurisprudence, supposing that it has been satisfactorily determined which of the thirteen colonial systems of equity jurisprudence was adopted, and that federal courts of equity are exempted from any obligation to follow State laws by virtue of any constitutional restrictions upon their powers, it is still true that the maxim, that equity follows the law, was an integral part of every equity system at that time, and, of course, was as much adopted as any other portion of the system. Every text-writer on equity treats of this maxim, and we refer to *Merlin on Equity and Equity Pleading*, Secs. 110 et seq.; *Spence's Equitable Jurisdiction*, Vol. I, pages 419-20-21; *Pomeroy's Equity Jurisprudence*, Vol. I, Secs. 425, 426, 427; *Fetter on Equity*, pp. 33-4,

and note 65, in which a quaint but forcible decision of Sir Joseph Jekyll is quoted. In that decision he says that in no case does equity contradict or overturn the grounds of principles of the law, as has been sometimes ignorantly imputed to it. This maxim, as applied to the federal courts of equity, requires them to conform to the positive requirements of State statutes in all matters not national in character. Appellees' learned counsel, at a time when they virtually admitted that they had no rights in the State courts, as shown by the following extract from a brief filed by them in the Circuit Court of Appeals in this case, and, when they relied solely upon the supposed system of uniform federal equity jurisprudence, argued that the maxim had no application to this case:

"The statutes of Louisiana on the subject of privileges or statutory liens and the decisions of her courts interpreting those statutes are ENTIRELY IMPERTINENT in this case. They deal with an entirely different subject from equitable liens.

"WHETHER THE LAW OF LOUISIANA RECOGNIZES OR DENIES EQUITABLE LIENS IS A QUESTION EQUALLY FOREIGN TO THIS CASE. The only effect would be to transfer the subject from the EXCLUSIVE to the CONCURRENT equitable jurisdiction of the court.

"If the State law RECOGNIZES such liens, that would not deprive this court of the power to enforce them in this case. If it DENIES such liens, that is the original reason why equity creates and enforces them."

Like many other questions of law, this matter can only be determined by a brief historical survey of the subject. One of the most curious and interesting chapters in legal history is the frantic efforts, made by Parliament, at that time composed for the most part of rude and unlettered warriors, in a series of statutes, to abolish the ecclesiastical invention of uses. The chancellors were ecclesiastics, who comprised within their ranks nearly all the learning and scholarship of that age, and they gravely examined the acts of Parliament to abolish uses, professing that they were as much bound by them as the courts of common law. An examination of these crude statutes by trained intellects always developed the fact that only certain prohibitions were contained in them, and that their effect could easily be avoided by applying the principle of uses to contingencies not provided for by Parliament, and, hence, not forbidden. The chancellors said: "Parliament has forbidden A, B and C, but has not forbidden X, Y and Z. Therefore, to the latter we will still continue to apply our principles." The binding effect of positive statutes upon chancery courts was not questioned even at that early stage in the development of equity jurisprudence.

For a general discussion of this subject see Minor's Institutes, Vol. II, Chap. X, and Spence's Equitable Jurisdiction, Vol. I, pp. 435 *et seq.*

In the nature of things statutes must be obligatory upon courts of equity as well as courts of common law, because it would be contrary to the theory of a government, composed of three coequal and co-ordinate

departments, to hold that the department vested with the power to enact laws can not bind all the courts. No case can be found declaring that courts of equity are not bound to follow positive statutory requirements. If they were not bound, they would be vested with power to repeal the law, and thus constitute a power higher than the legislative. It is perfectly true that equity allows rights and enforces remedies outside of the domain of the statutes, but has never openly violated them. The history of uses and trusts proves this assertion.

Blackstone, after enumerating a number of instances of hardship under positive laws which courts of equity can not relieve, concludes as follows:

"In all such cases of positive law, the courts of equity, as well as the courts of law, must say with *Ulpian*, '*Hoc quidem per quam durum est, sed ita lex scripta est.*'"

Blackstone then continues thus:

"It is said, that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess to interpret statutes according to the true intent of the Legislature. * * * But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity; the construction must in both be the same, or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish or alter that sense in a single title." Vol. III, marginal page 431.

Merwin, in his work on Equity and Equity Pleading, says, p. 60: "*All positive rules of law*, whether of statute or of common law, are as obligatory upon courts of equity as upon courts of law, whenever the matters to which those rules apply are in question." See also Fonblanque's Equity, Book I. Chap. I. Sec. 3. and Stern *et al.* vs. Gardner, 20 Ill. 304.

It is, therefore, clear, that courts of equity are bound by the positive requirements of statute law, and we think that we do not misstate the position of appellees' counsel when we say that their contention is, that a uniform system of federal equity jurisprudence was adopted by the federal constitution, but that from that system was eliminated one of its chief maxims—equity follows the law.

This maxim, of course, assuming for the sake of the argument that there is no other obligation resting upon federal courts of equity to follow State laws, has enabled them to conform to the inevitable changes in the rules of substantive law of the various States, while preserving uniformity in the forms of procedure in all the States. Were it otherwise, law would be in a state of continual improvement, owing to the means providing for its amelioration, while equity in the federal courts would be unable to modify any of its rules, no matter

how urgently required by the exigencies of changing conditions. The law would improve, equity would stagnate and defeat the very purpose for which it originally sprang into being. Let us see how the Supreme Court has construed this maxim.

In the case of *Hedges vs. Dixon County*, 150 U. S. 182, where the holders of municipal bonds, issued by a county in excess of its authority, tried to invest a court of equity with jurisdiction by offering to cancel so many of the bonds as exceeded the prescribed limit, and to have the residue thereof declared valid and enforced, the court said through Mr. Justice Jackson, on page 192, in dismissing the bill: "The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac vs. Thompson*, 15 How. 281, 299," that wherever the rights, or the situation of parties, are clearly defined and established by law, equity has no power to change or unsettle those rights, or that situation, but in all such instances *the maxim, æquitas sequitur legem*, is strictly applicable.

"WHERE A CONTRACT IS VOID AT LAW FOR WANT OF POWER TO MAKE IT, A COURT OF EQUITY HAS NO JURISDICTION TO ENFORCE SUCH CONTRACT, or, in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it. COURTS OF EQUITY CAN NO MORE DISREGARD STATUTORY AND CONSTITUTIONAL REQUIREMENTS AND PROVISIONS THAN CAN COURTS OF LAW. THEY ARE BOUND BY POSITIVE PROVISIONS OF A STATUTE EQUALLY WITH COURTS OF LAW, AND WHERE THE TRANSACTION, OR THE CONTRACT, IS DECLARED VOID BECAUSE NOT IN COMPLIANCE WITH EXPRESS STATUTORY OR CONSTITUTIONAL PROVISIONS, A COURT OF EQUITY CAN NOT INTERPOSE TO GIVE VALIDITY TO SUCH A TRANSACTION, OR CONTRACT OR ANY PART THEREOF. These general propositions clearly establish that the present bill can not be sustained, and our conclusion, therefore, is that there was no error in the judgment of the court below in dismissing the bill, and that judgment is accordingly affirmed."

Here the Supreme Court declare in emphatic terms that, when a contract is void at law for want of power to make it, a federal court of equity has no jurisdiction to enforce it. Such is the exact case at bar, where the so-called pledge of the unearned sugar bounty to an unascertained amount to secure an unascertained indebtedness is attempted to be enforced, and the pledgees, knowing that they have and never had either a right or a remedy in the State courts of Louisiana, are seeking for an unconstitutional perversion of federal power to protect them.

In the case of *Ewing vs. City of St. Louis*, 5 Wall. 419, the court say:

"The complainant can ask no greater relief in the courts of the United States than he could obtain, were he to resort to the State courts. If in the latter courts, equity would afford no relief, neither will it in the former."

VI.

A doctrine, like a tree, is known by its fruits, and it is indispensable in arriving at a correct decision of any disputed proposition of law to advert to its necessary consequences, and we will now accept the premises of the learned Judge *a quo*, and follow them to their logical conclusion.

The equity jurisdiction of the federal courts, meaning the rules of substantive law administered by them, was crystallized by the constitution, in 1789, and can not be changed save by an amendment of that instrument.

The implied mortgage, arising from the deposit of title deeds, was at that time an admitted branch of equity jurisdiction, and, therefore, must now exist. Hence, in defiance of the Louisiana Statute of Registry, a mortgage, perfect as against the world, can, to-day, be created in Louisiana by the simple deposit of title deeds, and enforced in a federal court of equity.

Trusts were another admitted branch of equity jurisdiction, at that time, and, therefore, must still exist. Trusts upon high considerations of public policy are inhibited in Louisiana by Art. 1520 of the Revised Civil Code. To-day, in Louisiana, a man may, by act *inter vivos*, or by will, convey property to another in trust for a third person, and the beneficiary can enforce this trust in a federal court of equity sitting in this State. A widow's right to the assignment of dower was then another acknowledged subject of equitable cognizance. Therefore, to-day, in Louisiana, a widow can enforce her right to the assignment of dower in a federal court of equity. Examples might be multiplied indefinitely, but we think that these are sufficient to demonstrate that the position is wholly untenable. See the introduction to Adams' Equity, for the grounds of equity jurisdiction, practically all of which existed, in 1789. Again, if a federal court of equity is not bound to respect State laws, why can not a chattel mortgage, though unknown to the law of Louisiana, be enforced in that court?

In each State there must, therefore, be two bodies vested with power to declare the law in matters of State law and local policy, the State Legislature and a federal court of equity, which must declare any State law unconstitutional and void, which in any manner modifies the subjects of equity jurisprudence, supposed to have been adopted by the federal constitution.

It may be added, that if this doctrine obtains, the Supreme Court of the United States would better at once enter a decree, were such a thing possible, to the effect that every State statute in conflict with any of the doctrines of this uniform system of federal equity jurisprudence is unconstitutional, null and void, and leave the States to begin the impossible task of conforming their laws to the new order of things.

The adoption of this doctrine would also mean the vague and indefinite extension of federal power, and that the fiat of the federal chancellor would change a government with limited into one of unlimited powers. This is a far stronger objection to the assumption of such power than any *argumentum ab inconvenienti*, for it involves the derangement of our dual system of government, and the reserved powers of the States, guaranteed by the United States Constitution, would be swallowed up in this flood-tide of usurped federal authority. Finally, even assuming that the position of appellees' counsel is correct, the maxim, equity follows the law, for the first time in the history of the equity system, would be formally abandoned, and a system perfected through centuries of labor would be remitted to that condition of "unbounded discretion" which marked its crude beginnings.

The contract sought to be set up by the intervenors in this suit is a nullity under the laws of Louisiana, and, therefore, no contract rights could ever have attached. It would seem very anomalous that a contract, void under an express State statute, and void in the State courts, could be enforced in the federal courts.

We have been unable to find a single federal decision, overturning a CONSTITUTIONAL STATE LAW, establishing a rule of property, and the provisions of the Civil Code, defining pledges and privileges, and regulating the preferences of creditors, are certainly rules of property.

VII.

No one could fail to be struck by the utter inconsistency of the two positions which the appellees' learned counsel advocate. They first claim for their clients a lessor's privilege of the most extensive order, on the ground that the Louisiana statute and decisions, and the sources thereof in the Code Napoleon, give it to them, and that this Court is bound to follow the Louisiana law, no matter how different it may be from the law of every other State in the Union. In the next breath they contend with equal vigor that their clients are entitled to an equitable lien, which is expressly forbidden by the Louisiana statutes and decisions, and insist that the Louisiana authorities must be disregarded, taking for granted that they can not seriously argue for the existence of equitable liens in Louisiana. In one case they vehemently call upon the Louisiana law to save them; in the other they call with equal vehemence upon a federal court of equity to save them from the Louisiana law. There is absolutely no difference between the cases, or the efficacy of the two statutes, and both are equally obligatory upon a federal court of equity.

They have addressed themselves to the engaging task of extending the lessor's privilege in the teeth of the solemn injunction of the Code that a privilege can only be claimed for those debts to which it

is expressly granted—to a case never contemplated by the statute, and to the further task of creating a privilege, known as an equitable lien in the common law States, in the teeth of an equally solemn injunction of the Code that lawful causes of preference are privileges and mortgages. In one case they want the Court to extend a recognized privilege, and in the other they want a privilege created, contrary to the State law.

In conclusion, the value of the federal system in matters of concurrent jurisdiction with the State courts depends upon its flexibility and its power to adapt itself to the jurisprudence of each State. The harmonious administration of the same laws in the concurrent jurisdictions is one of the wonders of government, and a perpetual vindication of the wisdom of the framers of the constitution. Well may we exclaim with Mr. Gladstone, as we witness its operation, that the federal constitution is the most wonderful instrument that the brain of man has ever devised within a given time.

WALTER H. SAUNDERS,

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BRIEF OF J. U. PAYNE ET AL., APPELLEES.

III.

The third question is as follows :

“If the second question be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Manufacturing Company?”

Courts of equity have, from time immemorial, recognized and enforced such equitable liens, and courts of the United States sitting in equity in the State of Louisiana have the unquestionable right and duty to recognize and enforce such a lien, unless its power and duty to do so can be and has been taken away by the statutory law of the State of Louisiana.

The contention of the appellants rests upon two propositions, failure to maintain either of which would be fatal to the contention, and both of which, we maintain, are absolutely unfounded.

These propositions are :

1st. That State legislation can take away the jurisdiction of courts of the United States to recognize and enforce equitable liens.

2d. That the statutory law of the State does forbid the recognition and enforcement of equitable liens.

We will consider these propositions in order and separately.

(1.)

Mr. Pomeroy, after defining the nature and origin of equity jurisdiction, proceeds to classify the jurisdiction as being either exclusive or concurrent.

The exclusive jurisdiction, he says, embraces :

“First. All civil cases in which the primary right violated or to be declared, maintained, or enforced, whether such right be an estate, title, or interest in property, or a lien on property, or a thing in action arising out of contract, is purely equitable, and not legal, a right, title, estate, or interest created by equity, and not by law. * * *

“Secondly. All civil cases in which the remedy to be granted, and of course, the remedial right, is purely equitable, or one which is recognized and administered by courts of equity, and not by courts of law.”

Id., Secs. 137-138.

“The concurrent jurisdiction embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought

to be maintained, enforced, or redressed, is one which is cognizable by the law, and in which the remedy conferred is of the same kind as that administered, under the like circumstances, by courts of law, being ordinarily a recovery of money in some form. The primary right, estate, title, or interest, which is the foundation of the suit, must be legal, or else the case would belong to the exclusive jurisdiction of equity; and the law must, through its judicial procedure, give some remedy of the same general nature as that given by equity, but this legal remedy is not, under the circumstances, full, adequate, and complete. The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this concurrent branch of the equity jurisdiction."

Pomeroy Eq. Jur., Sec. 139.

In defining the subjects which are embraced in the exclusive equity jurisdiction, Mr. Pomeroy expressly includes the recognition and enforcement of what are called "equitable liens." Id., Sec. 165.

This is done with manifest propriety, because the primary right and the remedy for its enforcement are both created exclusively by equity, and are not recognized at law; and, indeed, as abundantly shown by the authorities cited in our original brief, the fact that the law does not recognize such liens is the very reason why equity grants and enforces them.

What then can be the force or bearing of arguments going to show that the statutes of Louisiana do not recognize or enforce such rights, even if they were sound?

The enforcement of equitable liens arising from contracts is a branch of the great equitable remedy of specific performance which is also assigned by Mr. Pomeroy to the exclusive jurisdiction. Id., Sec. 171, No. 3.

The proposition that State legislation can limit or destroy the exclusive equity jurisdiction of the Federal Courts is absolutely unsound. If such legislation can destroy their exclusive equity jurisdiction to recognize and enforce equitable liens, it can equally destroy every other branch of their equity jurisdiction.

The State might pass statutes of the following tenor and effect:

1st. Parties to a contract shall not be entitled to enforce specific performance thereof, but the sole remedy for breach of contract shall be by an action of damages.

2d. Parties shall be bound irrevocably by the express terms of their contracts, and shall be entitled to no relief on the ground of accident, mistake, or fraud.

3d. Nothing shall be considered as done except that which has been actually done, and the rule that that shall be considered as done which ought to be done shall in no case be applied.

4th. What are known as equitable rights shall not be enforced, but no rights shall be recognized except those derived from the express terms of the statute of the State.

If such statutes were passed and were binding on the Federal Courts of the United States sitting in Louisiana, what would remain of the equity jurisdiction of the Federal Courts? Nothing except a vain and senseless system of judicial procedure, having no rational object or purpose, and no application to any substantive rights whatever to the enforcement of which the system was adapted and for the enforcement of which it was devised.

The effect would be to convert the State of Louisiana into a little island in the midst of the great sea of federal equity jurisdiction which embraces all the other States of this Union; at the shores of which the argosies of equity jurisprudence must halt and turn away to more congenial climes.

The proposition seems to us utterly untenable. It is in irreconcilable contradiction with the following cardinal principles which regulate and define the equitable jurisdiction of the courts of the United States, to-wit:

1st. That the equity jurisdiction of the courts of the United States is derived exclusively from the constitution and laws of the United States.

2d. That this jurisdiction, in the language of Mr. Pomeroy, "exists uniformly and to its full extent throughout the entire Union, independent of and unaffected by any State laws or any particular system of jurisprudence and legislation adopted by individual States," and "is wholly unmodified and unabridged by State legislation which deals with subjects belonging to the general system of equity jurisprudence. State laws subtracting from or limiting the scope of equity do not act upon the general powers and jurisdiction held by the national courts."

1 Pomeroy, Secs. 292, 293, 294.

3d. That Sec. 721, U. S. Revised Statutes, declaring "the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States" does not apply to cases in equity, in which cases the principles of equity jurisprudence, and not the laws of the State, are the rules of decision.

Every one of the foregoing cardinal principles is firmly established by the consistent jurisprudence of the federal courts from the foundation of the government until now, and not one of them was ever before, to our knowledge, seriously controverted. From the mass of authorities on the subject we select the following:

"The courts of the United States have jurisdiction in equity derived from the Constitution and laws of the Union, which is uniform throughout all the States."

Robinson vs. Campbell, 3 Wheaton, 212.

Neves vs. Scott, 13 Howard, 268.

Fitch vs. Creighton, 24 Howard, 159.

"The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. Their powers and

rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. In all these respects they are unaffected by State legislation."

Noonan vs. Lee, 2 Black. 509.

"While the courts of the Union are required by the statutes creating them to accept as rules of decision in trial at common law, the laws of the several States, their jurisdiction in equity can not be impaired by the local statutes of the different States in which they sit. * * * The equity jurisdiction of the courts of the United States is the same that the high court of chancery in England possesses, and is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union."

Kirby vs. Lake Shore R. R., 120 U. S. 130.

"Chancery jurisdiction is conferred on the courts of the United States by the Constitution, under certain limitations; and, under these limitations, the usages of the high court of chancery in England, which have been adopted as rules by this court, furnish the chancery law which is exercised in all the States, and even in those where no State chancery system exists.

"Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union."

State of Pennsylvania vs. The Wheeling, etc., Bridge Co., 13 Howard, 519. (Syllabus.)

"It was not the intention of Congress, by the enactments relating to the adoption of State laws in the courts of the United States, to confine the Federal Courts to the same remedies which existed in the courts of the respective States. Such a rule would forbid equitable jurisdiction to the Federal Courts sitting within those States which have no courts exercising such jurisdiction. The true rule is that the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of the particular State, but according to the principles of common law and equity jurisprudence, as those systems are distinguished and defined in England."

Supreme Court 1818, Robinson vs. Campbell.

3 Wheat. 212, 222, S. P. 1819, United States vs. Howland, 4 *Id.* 108, 115.

"The Supreme Court is not bound by the decision of a State court upon a question of equity jurisprudence. The Constitution having recognized equity as a branch of jurisprudence, whenever a case in equity arises under the judicial power of the United States it is for the courts of the United States, and for the Supreme Court, in the last resort, to decide the principles applicable to it."

4 Wheat. 115; 3 *Id.* 222; 6 Pet. 658; 9 Pet. 614; 12 How. 139; Supreme Ct. 1851, Neves vs. Scott, 13 How. 268.

"The jurisdiction of the Federal Courts can not be affected by State legislation, and they will enforce equitable rights created by such legislation if they have jurisdiction of the subject matter and the parties."

Supreme Ct. 1878, Smith vs. Railroad Co., 99 U. S. 398.

"The State laws furnish the rule of decision in the courts of the United States in cases at common law, but the equity jurisdiction of those courts is one and the same in every State, and is in no respect dependent upon local law."

2d Cir. 1837, *Lamson vs. Mix*, 6 Hunt Mer. Mag. 72; Federal Cases, Vol. 14, No. 8034; 3d Cir. (Pa.) 1826, *McFarlane vs. Griffith*, 4 Wash. C. C. 585; Federal Cases, Vol. 16, No. 8790.

"The rule that decisions of a State govern Federal law Courts sitting in civil matters within that State, does not apply to the administration of equity; which is, in such case, governed entirely by the general principles of Courts of Equity."

6th Cir. (Ohio) 1861, *Burt vs. Keyes*, 3 West. L. Month. 290; Federal Cases, Vol. 4, No. 2212.

"The practice of resorting to a Court of Chancery in order to set up an equitable against the legal title can not now be shaken. In all cases in which a Court of Equity takes jurisdiction, it will exercise that jurisdiction on its own principles."

Supreme Court 1809, *Bodley vs. Taylor*, 5 Cranch, 191.

"The remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the particular State, but according to the general principles of common law and equity jurisprudence, as those systems are distinguished and defined in England."

Supreme Court 1818, *Robinson vs. Campbell*, 3 Wheat. 212, S. P. 1819, *United States vs. Howland*, 4 Wheat. 108.

"State laws can not impair the equity jurisdiction of the Federal Courts. If the common law did not afford a remedy, but resort to equity was permitted on account of the defect, parties whose citizenship gives jurisdiction may still apply to the Circuit Court for equitable relief, notwithstanding that as between citizens of the State a State law has provided a legal remedy for cases of like nature. Supreme Court 1868, *Payne vs. Hook*, 7 Wall. 425; 1st Cir. (Mass.) 1836, *Gordon vs. Hobart*, 2 Sumn. 401; Federal Cases, Vol. 10, No. 5509; 1855, *Cropper vs. Coburn*, 2 Curt. C. Ct. 465; Federal Cases, Vol. 6, No. 3416; 4th Cir. (Va.) 1877, *Breeden vs. Lee*, 2 Hughes, 484; Federal Cases, Vol. 4, No. 1828; 5th Cir. (La.) 1871, *Noyes vs. Willars*, 1 Woods, 187; Federal Cases, Vol. 18, No. 10374; 1884, *Fletcher vs. New Orleans, etc., R. R. Co.*, 20 Fed. Rep. 345; 8th Cir. (Col.) 1881, *Strettell vs. Ballou*, 9 Fed. Rep. 256; 3 McCrary, 46; and see *United States vs. Howland*, 4 Wheat. 108.

"The distinction between law and equity is recognized and established, for the National Courts, by the Constitution and the acts of Congress regulating procedure, and can not be obliterated, with respect to those courts, by any statutes of a State. Notwithstanding a reformed code of procedure of a State declares that the distinction between law and equity is abolished, and that there shall be but one form of action—a civil action—if a complainant resorts to a Federal Court he must proceed at law or in equity, according to the nature of his case. If he files a bill in equity when he has an adequate remedy at law, his bill may be dismissed even on appeal."

Supreme Court 1867, *Thompson vs. Railroad Companies*, 6 Wall. 134. To nearly same effect, Supreme Court 1870. *Walker vs. Dreville*, 12 Wall. 440 S. P., 7th Circ. (Ohio) 1872. *Butler vs. Young*, 1 Flippin, 276; 7 West. Jur. 59; 6 Am. T. Rep. 53; Federal Cases, Vol. 4, No. 2245; N. Dist. of Ga., *Shuford vs. Cain*, 1 Abb. U. S. 302; Federal Cases, Vol. 22, No. 12,823.

"The distinction between the enforcement of legal rights and the pursuit of equitable remedies in the Circuit Court is well defined by law, and must be maintained."

Circ. of Cal. 1858, *Loring vs. Downer*, McAll. 360; Federal Cases, Vol. 15, 8513; *Byrd vs. Badger*, *Id.* 443; Federal Cases, Vol. 4, No. 2266.

"In that class of cases in which courts of equity exercise their own peculiar jurisdiction they do not consider themselves bound by statutes of limitation as obligatory laws, but usually apply them by way of analogy; unless injustice will result from so doing. 1st Circ. (N. H.) 1828, *Sherwood vs. Sutton*, 5 Mason. 143; Federal Cases, Vol. 21, No. 12,781; (R. I.) *Pratt vs. Northam*, *Id.* 95; Federal Cases, Vol. 19, No. 11,376; (Mass.) 1862, *Badger vs. Badger*, 2 Cliff. 137; Federal Cases, Vol. 2, No. 718; (Me.) 1874, *Sullivan vs. Portland & Kennebec R. R. Co.*, 4 *Id.* 212; Federal Cases, Vol. 23, No. 13,596; 3d Circ. (Pa.) 1831, *Baker vs. Biddle*, *Baldw.* 394; Federal Cases, Vol. 2, No. 764; 4th Circ. (Va.) 1880, *Etting vs. Marx*, 4 Fed. Rep. 673; 4 Hughes. 312; 5th Circ. (La.) 1880, *Chapman vs. Wilson*, 4 Woods, 30; 6th Circ. (Mich.) 1883, *Chewett vs. Moran*, 17 Fed. Rep. 820; 8th Circ. (Me.) 1883, *Fogg vs. St. Louis. H. & K. R., etc., Co.*, *Id.* 871. See also, *Union Bank of Louisiana vs. Stafford*, 12 How. 327; *Orendorf vs. Budlong*, 12 Fed. Rep. 24."

"The fact that the statute of limitations of the State has barred the claim in the State courts will not prevent a Federal court from entertaining a suit brought by a receiver of a national bank against the estate of a decedent for the recovery of a debt alleged to have been fraudulently concealed."

8th Circ. (Mo.), *Johnston vs. Roe*, 1 Fed. Rep. 692; 1 McCrary, 162; 10 Cent. L. J. 328; 9 Rep. 672.

"The provision of Rev. Stat. 721,—making the limitation laws of the States applicable to like actions brought in the National courts—does not include special limitations upon suits in equity. Hence Section 378 of the Oregon Civil Code, prescribing a limitation of five years as to a suit in equity to affect a patent to land, is not binding upon the Circuit Court sitting in that State. If, however, the circumstances of the particular case render it equitable and judicious to adopt the statute rule, the court, in the exercise of its discretion as a court of equity, will do so. 9th Circ. (Or.) 1875, *Hall vs. Russell*, 3 Sawyer, 506." Federal Cases, Vol. 11, No. 5943.

"The Congress of the United States, in the act by which the Federal courts were organized, enacted that 'the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' Rev. Stat., Sec. 721; Judiciary Act, 24 September, 1789, C. 20, Sec. 34, 1 Stat. 92. This statute has been often

the subject of construction in this court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded 'as rules of decision in trials at common law' is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance.

"The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity, or in admiralty; nor is it applicable to criminal offences against the United States (see *United States vs. Reid*, 12 How. 361), or where the Constitution, treaties or statutes of the United States require other rules of decision."

Bucher vs. Cheshire R. R. Co., 125 U. S. 582.

It has been further held that Section 721. Revised Statutes, does not apply even in law cases to questions of a general nature, such as Commercial Law, Law of Public Carriers, Law of Negligence, of Master and Servant, etc.

See 18 Wallace, 546, 16 Peters, 1, 102 U. S. 14; 100 U. S. 239; 138 U. S. 67; 147 U. S. 106; 145 U. S. 605; 152 U. S. 282; 70 F. R. 679; *Idem.*, 468; 45 F. R. 749.

See also Judge B. R. Curtis' Lectures on Jurisdiction and Jurisprudence of Courts of the United States, pp. 13 and 213.

These cases illustrate how strongly the Federal Courts resist the invasion of their powers and prerogatives by State statutes.

The suggestion that all these decisions only apply to rules and forms of equity practice and procedure, and not to the substantive equitable rights of the parties, is contradicted by the very terms of the authorities themselves, which make it clear that the rules of decision adopted by the National courts in equity cases in determining equitable rights and principles, are not the laws of the States, but are the rules and principles of equity jurisprudence.

The doctrine of equitable liens is derived from and founded exclusively upon the principles of equity, as established by equity jurisprudence. The power to recognize and enforce such liens is an element of equity jurisdiction conferred by the Constitution and laws of the United States. State laws did not confer this power and cannot take it away. It exists in all the other States of this Union, and the principle of uniformity requires that it should exist equally in the State of Louisiana.

May it please the Court:

It is in the nature of things that these repeated and emphatic decisions can not be ignored, or robbed of meaning, or held to be overruled by other decisions which do not, in terms, overrule. When cases are quoted which contain apparently contradictory doctrines, the court will look at all the decisions together, and find

some principle on which they may be reconciled. We believe that principle is easily found and clearly apparent. It is this, that as to matter falling within the concurrent jurisdiction of equity, legislation of the States will receive consideration and effect, but that with regard to purely equitable rights, arising under the exclusive equity jurisdiction, rights created by equity, solely and exclusively because they are not recognized by law, the decisions quoted and relied upon by us will apply and govern.

We have examined with great care the authorities referred to by our learned adversaries, and we find not one which derogates from the principles sustained by this jurisprudence as applicable to cases arising under the exclusive equity jurisdiction.

Of these authorities the following will be found to be cases at common law :

Burgess vs. Seligman, 107 U. S. 20.
 Pana vs. Bowles, 107 U. S. 541.
 Carroll vs. Smith, 111 U. S. 563.
 Andreson vs. Santa Anna, 116 U. S. 362.
 Bowles vs. Brimfield, 120 U. S. 764.
 Folsom vs. Township, 159 U. S. 625.
 Bank vs. Earl, 13 Peters, 519.
 Greene vs. Neal's Lessee, 6 Peters, 291.
 Suydam vs. Williamson, 24 Howard, 427.
 Leffingwell vs. Warren, 2 Black, 600.
 Telle vs. Walker, 11 U. S. 242.

Of course the *dicta* in such cases have no application to equity jurisdiction. The equity cases referred to are :

Hedges vs. Dickson, 150 U. S. 182.
 Lumber Company vs. Ott, 142 U. S. 628.
 Bank vs. Bank of Kansas City, 136 U. S. 235.
 Ewing vs. St. Louis, 5 Wallace, 413.
 May vs. Tenny, 148 U. S. 64.
 Casey vs. Cavaroe, 96 U. S. 497.
 Brine vs. Insurance Company, 96 U. S. 627, and others.

An examination of these cases will show that all of them were cases which fell within the concurrent, and not within the exclusive equity jurisdiction, and that the rights involved therein were not equitable rights created by equity, but rights based upon and derived from the law of the State.

In Hedges vs. Dickson the court simply held that a contract absolutely void under the Constitution and laws of the State by reason of the absolute incapacity of the party, a municipal corporation, to make it, could give rise to no rights, either equitable or legal, a familiar principal of equity. *Ex nihilo nihil fit.*

Lumber Company vs. Ott involved nothing but rights claimed under an assignment for the benefit of creditors made in pursuance to a State statute, and the validity of which depended upon compliance with the statute.

Union Bank vs. Kansas City Bank and *May vs. Tenney* involved precisely the same question.

A careful examination of the case of *Casey vs. Cavaroc* will show conclusively that no equitable lien was claimed or involved, but that the right asserted was based upon a statutory pledge, the validity of which depended upon compliance with the statute. In the statement of the case, at page 468, we find that the parties based their right to the securities upon the claim that they were "actually pledged" to them. In the argument of their counsel, as set forth at page 473, it will be found that the contention was solely that the pledge was valid. In the opinion of the court, at page 486, it is stated:

"It must not be overlooked that the *Credit Mobilier* has no other claim to the securities in question but that of pledge. A pledge and possession, which is its essential ingredient, must be made out, or their privilege fails."

It is clear that the case involved nothing but a claim of statutory right, which was, of course, to be determined according to the statute in equity, as well as at law.

The case of *Ewing vs. St. Louis*, 5 Wallace, 417, was a case involving simply the validity of proceedings taken in pursuance of a State statute, on the ground that the proceedings did not comply with the statute.

Brine vs. Insurance Co., 96 U. S. 627, only held that a State statute which allows the mortgagor twelve months to redeem after a sale under a decree of foreclosure, and to his judgment creditor three months after that, governs to that extent the mode of transferring the title, and that a Federal Court in Equity would no more deny that right than would a State Court.

We have no knowledge of any principle within the exclusive equity jurisdiction that denies such a right.

We have not time to analyze or to refer to the other equity cases quoted by counsel, but we hazard nothing in saying that of them were cases in which the rights involved were rights arising under the concurrent jurisdiction. We believe no case can be found in which a Federal Court of Equity has refused to enforce a purely equitable right created by equity for the very reason that it was not allowed by law, on the ground that the State statutes did not recognize it.

None of these cases has the slightest application to the question in the case at bar, which involves a purely equitable right, created by equity, and existing independently of any State statute.

The quotation from Sec. 297 of 1 Pomeroy must be read in connec-

tion with Secs. 291, 292, 293, 294, 295 and 296; and also with Secs. 137, 138 and 139, which define the distinctions between the exclusive and the concurrent equity jurisdiction, and especially with Sec. 427, which confines the maxim *equitas sequitur legem* to cases within the concurrent jurisdiction and excludes it from all application to cases within the exclusive equity jurisdiction, in which—

“The primary right violated or to be declared, maintained or enforced, whether such right be an estate, title or interest in property, or a lien on property, or a thing in action arising out of contracts, is purely equitable and not legal; a right, title, estate or interest created by equity and not by law.”

1 Pomeroy, Sec. 137.

In the latter cases, it is clear that the statutes of the State can not abridge or impair equitable rights or remedies created by equity, independently of law.

The suggestion that the doctrine of equitable liens does not apply to the case of an insolvent debtor would rob the doctrine of application to the only case in which it would serve any useful purpose. If the debtor was solvent and had means sufficient for the satisfaction of all his debts, there would not be the slightest reason for subjecting particular property to a special lien.

If the Ferris Company were solvent, and if the funds in the hands of the receiver were sufficient to satisfy all of its debts, we would not be here, pressing our claim for a lien on this particular fund. It is because the Ferris Company is insolvent, and the funds in the hands of its receiver are insufficient to satisfy all its debts, that we assert our lien upon this particular fund.

Equity recognizes this lien, and this Court, sitting as a Court of equity, will enforce it.

This case does not arise under the insolvent laws of the State of Louisiana. It is a case arising under the purely equitable jurisdiction of this Court, in the exercise of which this fund has been brought within the custody of the Court, to be marshaled and distributed by the Court to those who are entitled to it, and in distributing it, it is sitting as a Court of equity, and will recognize and enforce the equitable rights of parties as well as their legal rights.

There are no conflicting liens on this bounty. Our lien is confined by the decree to the bounty on the cane produced by ourselves, and no other creditor pretends to have any special lien upon it. It is a conflict solely between our equitable lien and the claims of the general creditors. To deny the lien in such a case would be an effectual obliteration of the equitable power of this Court to recognize an equitable lien in any case.

We claim this lien is a right created by equity, founded on the eternal principles of justice, enforced by equity in the exercise of its exclusive

jurisdiction under power derived from the Constitution and laws of the United States, which State statutes did not *confer*, and can not *take away*.

This involves no infringement of State rights. The States themselves consented to the delegation of this power and jurisdiction. The Constitution of the United States and laws passed in pursuance thereof, are as much laws of every State as any statute of the State itself.

We claim, therefore, that the legislation of the State of Louisiana can not abridge the right of a Court of the United States, sitting in equity, to recognize and enforce equitable liens.

(2.)

The other proposition, that the Civil Code of Louisiana prohibits the enforcement of equitable liens, is equally untenable.

State laws and State decisions upon the subject of "privileges" have not the remotest application to the subject of equitable liens. The Louisiana "privilege" and the equitable lien are not merely different, but are radically contradictory and antithetical concepts.

The Louisiana "privilege" is derived exclusively from the *law*; the equitable lien is derived from the contract of the parties. To say that there can be no equitable lien in any case in which the law does not grant a privilege, is to destroy the very reason for which the equitable lien is granted. If the law granted a privilege there would be no need to claim an equitable lien. Many rights may be created by the express terms of a contract, which would not be implied by law in the absence of express agreement. There is, therefore, not the slightest inconsistency in saying that although the law does *not* grant a *privilege*, the contract of the parties may establish an *equitable lien*, which is *not* a privilege. We say, therefore, that the laws of the State prescribing the cases in which the law grants a *privilege* independent of any contract between the parties, and decisions of the State Court interpreting those laws, have no application to the subject of *equitable liens*. No law of the State of Louisiana and no decision of her Supreme Court can be found which declares that the doctrine of equitable liens arising from contract is forbidden by the law of Louisiana. Our researches have failed to discover but three cases which ever dealt with the subject of equitable liens under the law of Louisiana. One is the case of *Wheeler vs. Insurance Company*, 101 U. S. 439. It was a case arising in Louisiana, and under Louisiana law, in which a purely equitable lien was claimed and enforced, and in which there was no pretence that the party had any statutory privilege, and there the Supreme Court of the United States said:

"The equitable doctrine upon which appellant's claim is founded undoubtedly obtains in Louisiana. It is derived from the civil law, which is the basis of the Civil Code of that State."

The other cases are the cases of Succession of Walsh, 9 An. 543, and Webre vs. Beltran, 47 An. 195, which will be referred to hereafter.

We deny that any decision to the contrary can be found or has been made by the Supreme Court of Louisiana, and we believe that the decision of the Supreme Court of the United States on this point is correct.

The Civil Code of Louisiana establishes as broad a system of equity as it is possible to conceive of. We call attention to the following articles of that Code:

Art. 21. "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent."

Art. 1903. "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect."

Art. 1964. "Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources."

Art. 1965. "The equity intended by this rule is founded on the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent. Courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity."

The Rubric of the Code under which the two last articles are found is headed: "Of the obligations to perform, as incidents to a contract, all that is required by equity, usage or law."

The remedy for the enforcement of equitable liens is a branch of the great equitable remedy of Specific Performance, which is a simple exertion of the power of the court to enforce specifically the obligations of the contract. Differently from the Common Law and from the Code Napoleon, the Civil Code of Louisiana expressly recognizes the remedy of specific performance of contracts:

Art. 1926. "On the breach of any obligation to do or not to do the obligee is entitled to damages, or, in cases which permit it, to a specific performance of the contract at his option, etc."

Art. 1927. "In ordinary cases the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts."

These articles were fully discussed by our Supreme Court in the case of Levine vs. Michel, 35 An. 1126.

There is, and can be, no rational denial that the obligations assumed by the Ferris Company in its contract with intervenors were perfectly

lawful and binding on the company, and there can be no reason why specific performance thereof should not be enforced. The fact that the contract was not effectual to create a legal privilege under the statutes of Louisiana, presents no obstacle whatever to compulsion of its specific performance.

The Supreme Court of Louisiana has expressly recognized the doctrine that an equitable right to be paid out of a fund by preference over the general creditors may result from the contract between the parties, although that contract did not create a legal privilege. Such an equitable right was enforced in the case of the Succession of Walshe, 9 An. 543, where the court began its decision by saying:

“It may be conceded that the company is not entitled to a privilege upon the fund in dispute, using that term in its technical sense. But we think the equity of the company to receive this fund by reason of the peculiar terms of their contract with Walshe, and the circumstances of the case, is clear.”

The court further says.

“It seems to us it would be a clear violation of the terms and spirit of the contract, and of the reservation made in the judge's order, to take the fund from the company, and distribute it *pro rata* among all the creditors. This case is the first of the kind presented for the consideration of this court, and our attention has not been directed to decisions of other tribunals upon the precise subject. But we find a very satisfactory analogy in the rule of the Supreme Court of Pennsylvania, in *Morgan vs. Bank of America*, 8 Serg. and R. 73.”

This was a plain case of equitable lien upon a fund, arising from contract, and not accompanied by any technical privilege, which was enforced by the Supreme Court of Louisiana.

The case of *Webre vs. Beltran*, 47 An. 195, is a very parallel case to the one at bar. It was a case of insolvency, and involved the distribution of bounty collected, precisely as in this case. Beltran did not claim to be the owner of the bounty, and he did not claim any technical pledge or privilege on the bounty, but he claimed that under his contract with the insolvent he was entitled to have his debt paid out of the bounty by preference over other creditors.

The case is very instructive, but we will content ourselves with quoting only one paragraph, to show how plainly the Court enforced an equitable lien arising from contract solely, in opposition to the claims of the syndie of the insolvent and the general creditors under the articles of the code relied on in this case:

“In reference to the bounty collected by Beltran & Co., it is claimed that the law gave no privilege or pledge to the defendant upon that fund, and that not having been collected from the government at the time of the surrender it should be turned over to the syndie to be disposed of as the common pledge of all the creditors. It may be true that neither a privilege nor a pledge resulted by law in favor of Beltran & Co., by reason of their being furnishers of supplies, and that it would be

necessary for them to base their right on contract, but this is precisely what they do. They rest upon the verbal contract between the parties made in the beginning of the year 1892, and the stipulations of the parties in regard to it." Page 202.

The Court maintained the contract right of Beltran to be paid out of the bounty by preference over all other creditors. We consider these two cases decisive of the question that the courts of Louisiana will and do recognize and enforce equitable liens arising from contracts by preference, in proper cases, over technical privileges.

It is, moreover, a familiar principle of the law of Louisiana that privileges and mortgages only take effect upon the property of a person in the condition in which that property was at the time when the party acquired it, and that such privileges and mortgages are subordinate to legal rights created and existing at the time of his acquisition of the property.

In this case, the cane of these intervenors passed into the ownership and possession of the Ferris Company, subject to the express agreement and obligation that the bounty which might be collected on sugar produced from this particular cane should be devoted to the payment of intervenor's claims, and should be subject to an equitable lien for the satisfaction thereof. The property passed into their possession and ownership subject to these rights and obligations, and they can not be displaced or impaired by any liens or privileges which the law might create upon the property after its acquisition by the Ferris Company.

There can not be the slightest doubt that if this case was before the Supreme Court of Louisiana, that tribunal would recognize and enforce the right of these intervenors to have their contract executed, and to be paid out of this fund in preference to any other creditors of the Ferris Company, and that any privilege that such creditors might have would be subordinated to the clear equitable right of intervenors, subject to which only, the Ferris Company acquired the property.

We therefore maintain that the second proposition on which the contention of appellant is founded is equally as fallacious as the first.

On the whole we submit that all the questions certified to this Court should be solved in favor of appellees, and that this Honorable the Circuit Court of Appeals should be advised to affirm the decree appealed from.

Respectfully submitted,

CHAS. E. FENNER,

Solicitor for Payne et al., Appellees.

FORMS OF PLEDGES.

No. 1.

Know all Men by these Presents, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by.....bank.....of the city of New York, hereby agree with the said bank that whenever the undersigned shall become or remain, directly or contingently, indebted to the said bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or in any other manner whatsoever, or upon any other claim, the said bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely :

1. All securities deposited by the undersigned with said bank, as collateral to any such loan or indebtedness of the undersigned to said bank, shall also be held by said bank as security for any other liability of the undersigned to said bank, whether then existing or thereafter contracted; and said bank shall also have a lien upon any balance of the deposit account of the undersigned with said bank existing from time to time, and upon all property of the undersigned of every description left with said bank for safe keeping or otherwise, or coming to the hands of said bank in any way, as security for any liability of the undersigned to said bank now existing or hereafter contracted.

2. Said bank shall at all times have the right to require from the undersigned that there shall be lodged with said bank as security for all existing liabilities of the undersigned to said bank, approved collateral securities to an amount satisfactory to said bank; and upon the failure of the undersigned at all times to keep a margin of securities with said bank for such liabilities of the undersigned, satisfactory to said bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said bank shall at the option of said bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either to pay any indebtedness to said bank when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said

bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Brokers' Board or otherwise, and apply the proceeds of such sale as far as needed toward the payment of any or all of such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction, said bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said bank.

Dated New York, the day of , 189 ..

No. 2.

\$ GOLD.

NEW YORK, 189 ..

..... without grace promise to pay to or order, at their office, in the city of New York, the sum of dollars, gold coin of the United States, present standard of weight and fineness, for value received, with interest at the rate of per cent. per annum, payable having deposited herewith, and pledged as collateral security to the holder hereof, the following property, viz.: with authority to the holder hereof to sell the whole of said property, or any part thereof, or any substitutes therefor, or any additions thereto, at any Brokers' Board, in the city of New York, or at public or private sale in said city or elsewhere, at the option of such holder, on the non-performance of any of the promises or agreements herein contained, without notice of amount claimed to be due, without demand of payment, without advertisement and without notice of the time and place of sale, each and every of which is hereby expressly waived.

It is agreed that in case of depreciation in the market value of the property hereby pledged which market value is now (\$), or which may hereafter be pledged for this loan, a payment shall be made on account of this loan upon the demand of the holder hereof, so that the said market value shall always be at least per cent. more than the amount unpaid of this note, and that in case of failure to make such payment, this note shall, at the option of the holder hereof,

become due and payable forthwith, anything hereinbefore expressed to the contrary, notwithstanding, and that the holder may immediately reimburse by sale as hereinbefore provided of the said property or any part thereof. In case the net proceeds arising from any sale, hereunder, shall be less than the amount due hereon promise to pay to the holder, forthwith after such sale, the amount of such deficiency with legal interest.

It is further agreed that any excess in the value of such collaterals, or surplus from the sale thereof beyond the amount due hereon, shall be applicable, upon any other note or claim held by the holder hereof, against now due or to become due, or that may be hereafter contracted; and that, if no other note or claim against is so held, such surplus, after the payment of this note, and the expenses of such sale shall be returned to or assigns.

It is further agreed that upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof, who shall retain a claim against the maker hereof for any deficiency arising upon such sale.

No. 3.

\$

NEW YORK, 189 ..

..... without promise to pay to or order, at their office, in the city of New York, the sum of dollars, for value received, with interest at the rate of per cent. per annum, payable having deposited herewith, and pledged as collateral security to the holder hereof, the following property, viz.: with authority to the holder hereof to sell the whole of said property, or any part thereof, or any substitutes therefor, or any additions thereto, at any Brokers' Board, in the city of New York, or at public or private sale in said city or elsewhere, at the option of such holder, on the non-performance of any of the promises or agreements herein contained, without notice of amount claimed to be due, without demand of payment, without advertisement and without notice of the time and place of sale, each and every of which is hereby expressly waived.

It is agreed that in case of depreciation in the market value of the property hereby pledged which market value is now (\$.....), or which may hereafter be pledged for this loan, a payment shall be made on account of this loan upon the demand of the holder hereof, so that the said market value shall always be at least..... per cent. more than the amount unpaid of this note, and that in case of failure to make such payment, this note shall, at the option of the holder hereof,

become due and payable forthwith, anything hereinbefore expressed to the contrary, notwithstanding, and that the holder may immediately reimburse by sale, as hereinbefore provided, of the said property or any part thereof. In case the net proceeds arising from any sale, hereunder, shall be less than the amount due hereon promise to pay to the holder, forthwith after such sale, the amount of such deficiency with legal interest.

It is further agreed that any excess in the value of such collaterals, or surplus from the sale thereof beyond the amount due hereon, shall be applicable upon any other note or claim held by the holder hereof, against now due or to become due, or that may be hereafter contracted; and that, if no other note or claim against is so held, such surplus after the payment of this note and the expenses of such sale shall be returned to or assigns.

It is further agreed that upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof, who shall retain a claim against the maker hereof for any deficiency arising upon such sale.

No. 4.

§

NEW YORK, 189....

On Demand, with interest at per cent. per annum, we promise to pay to the Bank of, National Banking Association, or Order at said Bank, dollars, in United States Gold Coin, or its equivalent, for value received, having deposited with said Bank, as collateral security:

If the market value of said securities, or of any hereafter deposited therewith, or of the remainder after the application of any part thereof to any other note or claim, shall at any time be less than twenty per cent. beyond the amount of this note and interest, the said Bank shall have the right until this note be paid, to retain and apply any money, collaterals, securities or property of ours of any kind, that it may then have or thereafter acquire to make good the deficiency.

In case of the non-payment of this note, according to its terms, we hereby authorize said Bank to sell said collaterals, securities or property, and to apply the aforesaid money and the net proceeds of such sale to the payment of this note and interest thereon: such sale to be made at the Bank's option, without notice, at the Board of Brokers or at public or private sale. Any amount which may then remain due hereon we promise to pay to said Bank, forthwith after such sale, with legal interest.

It is further agreed, that said collaterals, or any excess in the value thereof, or any surplus from the sale thereof, beyond the amount due hereon, shall be applicable upon any other note or claim held by said Bank against us, and for that purpose may be sold in the manner above stated; and if said Bank hold no other note or claim against us, such surplus after payment of this note, shall be returned to us, and in case of any exchange of or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collaterals.

It is also understood that upon any sale of any of said collaterals, said Bank may become the purchaser thereof and hold the same thereafter in its own right, absolutely free from any claim of ours.

No. 5.

TIME.

\$.....

NEW YORK,..... 189....

.....after date, we promise to pay to The Bank of, National Banking Association, or order, at said bank,.....dollars, in U. S. gold coin or its equivalent, for value received, having deposited with said bank as collateral security....., and agreeing that if the market value of said securities, or of any hereafter deposited therewith, or of the remainder after the application of any part thereof to any other note or claim, shall at any time be less than twenty per cent. beyond the amount of this note and interest, we will from time to time duly deposit with said bank further collateral security of sufficient market value to maintain such margin of twenty per cent.; and that until such further deposit be made or this note be paid the said Bank shall have the right to retain and apply any money, collaterals, securities or property of ours of any kind that it may then have or thereafter acquire, to make good the deficiency; and that, if such further deposit be not so made within one day after demand thereof by said Bank, this note thereupon, at the option of said Bank, shall become due and payable forthwith.

And in case of non-performance of this promise or agreement, we hereby authorize said Bank, at its option, to sell said collaterals, securities or property, and to apply the aforesaid money and the net proceeds of such sale to the payment of this note and interest thereon, such sale to be made, at the Bank's option, without notice, at the Board of Brokers, or at public or private sale, and any amount which may then remain due hereon, we promise to pay to said Bank forthwith after such sale, with legal interest.

It is further agreed that said collaterals or any excess in the value

thereof, or any surplus from the sale thereof beyond the amount due hereon, shall be applicable upon any other note or claim held by said Bank against us, and for that purpose may be sold in the manner above stated; and if said Bank hold no other note or claim against us such surplus after payment of this note, shall be returned to us; and in case of any exchange of or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collaterals.

It is further agreed that, in the event of any suspension, failure or assignment for the benefit of creditors on the part of the undersigned, this obligation shall thereupon, at the option of the said Bank with or without notice, immediately mature and become due and payable.

It is also understood that upon any sale of any of said collaterals, said Bank may become the purchaser thereof, and hold the same thereafter in its own right, absolutely free from any claim of ours.

No. 6:

\$

BOSTON, 189....

On demand, after date, for value received, with interest at the rate of per cent. per annum, promise to pay to National Bank of Boston, or order, at its place of business, dollars, having deposited herewith as collateral security,, with authority to sell the same, or any collaterals substituted for or added to the above, without notice, either at public or private sale, or otherwise, at the option of the said National Bank, on the non-performance of this promise, said Bank applying the net proceeds to the payment of this note, and accounting to for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against held by said Bank. Should the market value of any security pledged for this loan, in the judgment of the holder or holders hereof, decline, hereby agree to deposit on demand (which may be made by a notice in writing sent by mail or otherwise to residence or place of business), additional collateral, so that the market value shall always be at least per cent. more than the amount of this note; and failing to deposit such additional security, this note shall be deemed to be due and payable forthwith, anything herein before expressed to the contrary notwithstanding, and the holder or holders may immediately reimburse themselves by the sale of the security; and it is hereby agreed that the holder or holders of this note, or any person in his or their behalf, may purchase at any such sale.

.....

No. 7.

\$.....

BOSTON, 189 ..

..... without grace, promise to pay to, or order, at their office, in the city of Boston, the sum of dollars, value received, with interest at the rate of per cent. per annum, payable having deposited herewith, as collateral security for the payment of this note and for all other indebtedness, whether direct or indirect, which may from time to time incur, to said, the following property, namely:

Until the payment of this note and such other indebtedness the holders hereof may, at their option, use or hypothecate all or any of said property for their own use; and upon default in the payment of this note or such other indebtedness, or in the performance of any of the promises herein contained, the holders hereof are authorized to sell all said property, or any part thereof, or any substitute therefor, or any additions thereto, at one or more sales, at any Broker's Board in the city of Boston, or at public auction or private sale in said city or elsewhere, at the option of such holders, without notice of amount claimed to be due, without demand of payment, without advertisement and without notice of the time and place of sale, each and every of which is hereby expressly waived. On death this note shall be deemed at once due and payable; and the holders hereof may exercise the above power of sale, without notice or demand, and before as well as after the appointment of an executor or administrator of estate.

In case of a depreciation in the market value of the property hereby pledged, which market value is now \$....., or which may hereafter be pledged for this loan, agree to furnish additional security satisfactory to the holders hereof, without demand or notice, so that the market value of the property held as security hereunder shall always be at least per cent. more than the amount hereof. And, upon failure to furnish such additional security, this note shall, at the option of said holders, be deemed to be due and payable forthwith, anything herein expressed to the contrary notwithstanding; and said holders may immediately reimburse themselves by sale of said property or any part thereof as hereinbefore provided.

In case the net proceeds arising from any sale hereunder shall be less than the amount due hereon, promise to pay to the holders hereof forthwith after such sale the amount of such deficiency with legal interest.

It is further agreed that, if the net proceeds received from any sale hereunder exceed the amount due hereon, such excess shall be applicable upon any other indebtedness, whether then or thereafter to become due from to said; and the balance of such proceeds,

after the payment of the amount due hereon, and the satisfaction of all other indebtedness, shall be returned to or assigns.

It is further agreed that upon any sale by virtue hereof the holders hereof may purchase the whole or any part of said property discharged from any right of redemption, which is hereby expressly released to the holders hereof, who shall retain a claim against for any deficiency arising from such sale.

No. 8.

\$.....

BOSTON, 189....

..... after date, for value received.
 as principal and
 as sureties, jointly and severally promise to pay to.....
 Trust Company or order, at its place of business in Boston,
 dollars, having deposited with this obligation as collateral security
 with authority to sell the same, or any
 collaterals substituted for or added to the above, without notice, either
 at public or private sale, or otherwise, at the option of the said
 Trust Company, on the non-performance of this promise, said trust
 company applying the net proceeds to the payment of this note and
 accounting to for the surplus, if any;
 and it is hereby agreed that such surplus, or any excess of collaterals
 upon this note, shall be applicable to any other note or claim against
 held by said trust company. Should the
 market value of any security pledged for this loan, in the judgment
 of the holder or holders hereof, decline,
 hereby agree to deposit on demand (which may be made by a notice in
 writing sent by mail or otherwise to
 residence or place of business) additional collateral, so that the market
 value shall always be at least per cent. more than the amount of
 this note; and failing to deposit such additional security, this note
 shall be deemed to be due and payable forthwith, anything hereinbe-
 fore expressed to the contrary notwithstanding, and the holder or
 holders may immediately reimburse themselves by the sale of the
 security as aforesaid; and it is hereby agreed that the holder or
 holders of this note, or any person in his or their behalf, may purchase
 at any such sale.

No. 9.

\$..... PHILADELPHIA, 189....

On demand, for value received, promise to pay to the order of Dollars, with interest, having deposited as collateral security for payment of this or any other liability or liabilities to said holder hereof, due or to become due, or that may be hereafter contracted, the following property, viz.: with the right on the part of the holder hereof, to repledge the securities above mentioned, or to substitute or exchange for the same other certificates of like tenor and amount, and also from time to time to demand additional collateral security, and upon failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority, to the holder hereof, or assigns, in case of such default, or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions thereto, at any broker's board, or at public or private sale, at their option, at any time or times thereafter, without advertisement or notice to the undersigned, and with the right on the part of the holder hereof, to become purchaser thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds, of such sale or sales so made, to pay any, either or all of said liabilities, as said holder hereof shall deem proper, returning the overplus to the undersigned; and the undersigned will still remain liable for any amount so unpaid. It being further understood and agreed that The National Bank of Philadelphia shall have a like lien upon any and all funds, stocks, bonds, notes, and other property at any time in the hands of the said bank belonging to the maker, or endorser or endorsers, or guarantor or guarantors hereof, as security for this note and for any and all liability or liabilities matured or unmatured, of such maker, endorser or endorsers, guarantor or guarantors to said bank, which lien shall be enforceable in like manner and shall be subject to all the provisions herein above and before mentioned and set out.

Payable at The National Bank.

No. 10.

\$..... PHILADELPHIA, 189 ..

..... after date, for value received, promise to pay to the order of dollars, having deposited as collateral security for payment of this or any other liability or liabilities to said holder hereof,

due or to become due, or that may be hereafter contracted, the following property, viz.: with the right on the part of the holder hereof, to repledge the securities above mentioned, or to substitute or exchange for the same other certificates of like tenor and amount, and also from time to time to demand additional collateral security, and upon failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority, to the holder hereof, or assigns, in case of such default, or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions thereto, at any broker's board, or at public or private sale, at their option, at any time or times thereafter, without advertisement or notice to the undersigned, and with the right on the part of the holder hereof, to become purchaser thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said holder hereof shall deem proper, returning the overplus to the undersigned; and the undersigned will still remain liable for any amount so unpaid. It being further understood and agreed that The National Bank of Philadelphia shall have a like lien upon any and all funds, stocks, bonds, notes, and other property at any time in the hands of the said Bank belonging to the maker, or endorser or endorsers, or guarantor or guarantors hereof, as security for this note and for any and all liability or liabilities, matured or unmatured, of such maker, endorser or endorsers, guarantor or guarantors to said Bank, which lien shall be enforceable in like manner and shall be subject to all the provisions herein above and before mentioned and set out.

Payable at The National Bank.

No. 11.

§

PHILADELPHIA,, 189...

..... after date, for value received promise to pay to the order of dollars, having deposited as collateral security for payment of this or any other liability or liabilities to said holder hereof, due or to become due, or that may be hereafter contracted, the following property, viz.: with the right on the part of the holder hereof, to repledge the securities above mentioned, or to substitute or exchange

for the same, other certificates of like tenor and amount, and also from time to time to demand additional collateral security, and upon failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority, to the holder hereof, or assigns, in case of such default, or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole or any part of such securities, or any substitutes therefor or additions thereto, at any broker's board, or at public or private sale, at their option, at any time or times thereafter, without advertisement or notice to the undersigned, and with the right on the part of the holder hereof, to become purchaser thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said holder hereof shall deem proper, returning the overplus to the undersigned; and the undersigned will still remain liable for any amount so unpaid. It being further understood and agreed that The National Bank of Philadelphia shall have a like lien upon any and all funds, stocks, bonds, notes, and other property at any time in the hands of the said bank belonging to the maker, or endorser or endorsers, or guarantor or guarantors hereof, as security for this note and for any and all liability or liabilities, matured or unmatured, of such maker, endorser or endorsers, guarantor or guarantors to said bank, which lien shall be enforceable in like manner and shall be subject to all the provisions herein above and before mentioned and set out.

Payable at The National Bank.

No. 11—*Endorsed on Back.*

For value received, hereby assign, transfer and set over to The National Bank of Philadelphia, or order, a promissory note drawn by, to the order of, for dollars, dated, payable after date; and do also assign to the said The National Bank of Philadelphia, or order, all right, title and interest in the collateral and moneys mentioned in the said note, and hereby guarantee the prompt payment of the said note, at the maturity thereof, whether such maturity occurs by expiration of time, or for any other cause, as mentioned in the said note. And this guarantee is made expressly subject to all the terms, conditions, and provisions of the said note.

No. 12.

\$.....

BALTIMORE, , 189....

..... for value received, promise to pay to The National Bank, or order, at said bank, dollars, with having deposited with said bank as collateral security for the payment of this note, with such additional collaterals as may from time to time be required by its president or cashier, and which additional collaterals we hereby promise to give at any time, on demand. If these additional collaterals be not so given when demanded, then this note to be due, and rebate of interest taken shall be allowed on payment prior to maturity. And hereby give to said bank, its president or cashier, full power and authority to sell and assign and deliver the whole or any part of said collaterals, or any substitutes therefor, or any additions thereto, at any Brokers' Board or elsewhere, at public or private sale, at the option of said bank, or its president or cashier, or either of them, on the non-performance of the above promises, or any of them, or at any time thereafter, and without advertising or giving to any notice, or making any demand of payment. And also agree to pay all legal or other costs and expenses for collection of this note, or sale and delivery of the collateral, and should any deficiency remain, further promise and agree to pay the same to the holder hereof on demand.

IT IS ALSO AGREED, that said collaterals may from time to time, by mutual consent, be exchanged for others, which shall also be held by said bank on the terms above set forth, and that if shall come under any other liability, or enter into any other agreement with said bank while it is the holder of this obligation, that the net proceeds of sale of the above securities may be applied to this note, and any other liabilities or engagements held by said bank.

.....

No. 13

\$.....

NEW ORLEANS, 189....

..... after date promise to pay to the order of at Bank of New Orleans, dollars, for value received, with interest at the rate of per cent. per annum, from until paid.

The securities mentioned on the reverse hereof are hereby pledged and delivered to secure payment of this note. Should said securities decline in value, the maker of this note hereby agrees, within twenty-four hours from demand to that effect by the holder, to pledge additional

securities satisfactory to the holder, to cover such decline. Failure or refusal to comply with this demand shall at once mature this note and pledge. On maturity of this note, either by its terms or on account of the failure to make good any decline in value of the pledged securities, the holder is hereby authorized to sell said securities at public or private sale, without recourse to judicial proceedings, and to make any transfers of stock or other property that may be required to effect such sale, and to apply the proceeds thereof to the payment of this note and of any costs, and attorney's fees that may be incurred, and the remainder, if any, to the payment of any other indebtedness, whether matured or not matured, up to the amount of two hundred and fifty thousand dollars owed by the maker hereof to this bank. The holder of this note shall have the right to purchase the pledged securities at their market value, or at any judicial or auction sale thereof, or when sold on the Stock Exchange. The drawer agrees to pay attorney's fees, estimated at 5 per cent. on the amount of this note and secured by this pledge, in case of the employment of an attorney to enforce this note or pledge. At the maturity of this note, any money on deposit, or otherwise to the credit of the maker, on the books of said Whitney National Bank, shall at once stand applied to the payment of this note, unless otherwise paid.

Due

No. 14.

\$ NEW ORLEANS, La., 189...

..... after date promise to pay to the order of at the National Bank of New Orleans, dollars, for value received, with interest thereon at the rate of per cent. per annum from until paid.

This note is secured by pledge and delivery of the securities mentioned on the reverse hereof. Should said securities decline in value, the maker of this note hereby agrees, within twenty-four hours from demand on him to that effect made by the holder of this note, to furnish and pledge additional securities, satisfactory to the holder of the note, to cover such decline. And the failure or refusal by the maker to furnish such additional securities when so called for shall at once mature this note and pledge.

Should this note not be paid at maturity, or when it becomes due by failure to furnish additional securities as above provided or for any other reason, the then holder thereof is hereby authorized to sell the pledged securities, at public or private sale, without recourse to judicial proceedings, and is hereby irrevocably authorized to transfer any shares

of stock, or other securities, on the books of the company issuing same, to purchaser under such public or private sale. The proceeds of the sale of said pledged securities shall be applied (1) to the payment of all costs and commissions for selling, (2) to the payment of this note, in principal, and interest and the 5 per cent. attorney fees, below stipulated, (3) to the payment of any other indebtedness, then due or thereafter to become due, by the maker of this note to the said National Bank up to the sum of \$100,000. The holder of this note shall have the right to purchase the pledged securities at their market value, if there is any market value, or at any judicial or auction sale thereof, or when sold on the Stock Exchange of New Orleans. Should this note not be paid at maturity or when due as above, or should it become necessary to employ an attorney to make or enforce the same, or should this note be placed in the hands of an attorney for collection, the maker shall pay the fees of such attorney to be estimated at 5 per cent. on the amount then due on this note, which attorney's fees are secured by this pledge. At the maturity of this note, or when otherwise due, as above provided, any money on deposit or otherwise to the credit of the maker on the books of said National Bank, shall at once stand applied to the payment of this note, unless it be otherwise paid.

Due

NO. 15.

§ NEW ORLEANS, 189....

..... after date promise to pay to the order of The of Louisiana, at its banking house, No. street, New Orleans, dollars, for value received with interest at the rate of eight per cent. per annum from maturity until paid.

This note is secured by pledge of the securities mentioned on the reverse hereof, with the right to call for additional security should the same decline, and on failure to respond, this obligation shall be deemed to be due and payable on demand. With full power and authority to sell, and assign, and deliver, the whole of the said property, or any part thereof, or any substitutes therefor, or any addition thereto, at any broker's board, or at public or private sale, at the option of said bank, on the non-performance of this promise, and without further notice, applying the net proceeds, first, to the payment of this note, interest and cost of the sale, and the balance, at the option of the bank, to any other liability to the bank now existing or which may hereafter accrue, and accounting to me for the surplus, if any, and I hereby agree to pay attorney's fees of five per cent. on the amount sued for, or recovered without suit, by sale or collection of the securities, in case of suit or legal

services in or out of court. It is further agreed that the pledgee shall have the right to buy in the said securities at market rate at said private or public sale. It is further agreed that, independently of the right to sell the said securities, the bank, at the maturity of this note, and on my default to pay same, shall have the right immediately to apply any sum or balance to my credit, on its books, to the payment of said note, interest and costs.

Due

Address

No. 16.

\$.....

NEW ORLEANS, La., 189 ..

..... after date for value received, promise to pay to the order of the Bank, dollars, with interest at the rate of eight per cent. from maturity until paid, having pledged as collateral security for the payment of this note, and any other liability to said Bank to the extent of collaterals the following property:, with the right to call for additional security should the same decline, and on failure to respond, this obligation shall be deemed to be due, and payable on demand, less the rebate for the unexpired term. With full power and authority to sell, and assign, and deliver, the whole of the said property, or any part thereof, or any substitutes therefor, or any addition thereto, at any Broker's Board, or at public or private sale, at the option of said Bank, on the non-performance of this promise, and without further notice, applying the net proceeds, first, to the payment of this note, and the balance, at the option of the Bank, to any other liability, and accounting to for the surplus, if any.

Payable at.....

INDEX.

Reference is to sections; where reference is made in index to any subject, and a number is not given, the reference is to the heading in the index itself.

ARTIST.

SECTION.

May pledge executed work; delivery of pledge and rights of
pledgee 64

ASSESSMENT, ON STOCK PLEDGED.

Pledgeor bound for them when paid by pledgee.....274

ASSIGNMENT, OF CHoses IN ACTION. (See Incorporeal Rights.)

Distinction between—in full ownership or for pledge as
security105, 106, 108
Of bill of lading, effect of.....108
In Bankruptcy—See Syndic.

ATTACHMENT.

Gives creditor tacit pledge or lien on property attached..... 531, 533

ATTORNEY.

Has lien for his fee on property recovered for client.....538

AUTHOR.

May pledge executed work; delivery of pledge and rights of
pledgee 64

BAILEE. (See Pledgee.)

BAILMENT. (See Pledge, Delivery, Possession.)

BAILOR. (See Pledgeor.)

BANKRUPTCY, OF PLEDGEOR. (See Syndic.)

Does not impair rights of pledgee260 et seq.
Does not revoke his power of attorney to sell pledge.....278, 280

BELGIUM. (See Policies of Insurance.)

Bill of lading in — is negotiable, and *bona fide* vendee or
pledgee has perfect title.....360

BILL OF LADING. (See Warehouse Receipts.)

Effect of transfer of — for pledge.....108
Delivery of — in Louisiana made by mailing.....145
And consignee's privilege primes vendor's.....145
Is not symbol of goods, but muniment of title.....331

BILL OF LADING—CONTINUED.

	SECTION.
Holder of — has constructive, corporeal, vicarious possession of goods.....	331
Pledge of — actually pledges the goods.....	331
But pledgee of — is not owner of goods.....	332, 333
Pledgee has only a qualified property in goods.....	334, 335
And is entitled to delivery and possession of goods.....	336
In France and Louisiana — made to a <i>designated individual</i> is not negotiable, and its pledge not valid against owner or vendor of goods.....	337, 338
Under commercial law — is only <i>quasi</i> negotiable.....	339 to 355
Aliter under civil law.....	356 et seq.
Under law merchant, pledgeor or vendor of — transferred only title he possessed.....	339, 340
Pledgee or vendee obtains only rights of transferror.....	341
Statutory enactments to extend negotiability of —.....	342 to 353
Give qualified negotiability in England.....	342, 344, 345
Louisiana.....	344 to 351
Missouri.....	348
California.....	353
Wisconsin.....	353
Give perfect negotiability in Maryland.....	343, 346, 352
Jurisprudence in Federal court give — qualified negotiability.....	345, 348
But if owner has conferred authority on transferror, pledgee obtains valid pledge.....	355
In France, Italy, Belgium and Holland — have perfect negotiability and <i>bona fide</i> pledgee or vendee has title against owner.....	360
Conflict of law, arising from difference of principle.....	361, 362
Bill of lading is receipt for goods and contract of affreightment.....	364
Performance of contract is at place of delivery of goods.....	364, 369 et seq.
Doctrine that <i>lex loci contractus</i> controls unless contrary intention is manifested.....	366 to 368, 376, 377
Criticism of the doctrine.....	378 to 385
Consequences flowing from rule that <i>lex loci solutionis</i> or <i>contractus</i> governs.....	364, 365
The law applicable to the bill of lading controls its pledge.....	369, 381 to 385

BROKER. (See Stocks.)

Is pledgee of margins deposited with him.....	9, 470, 471
Pledge extends to stocks and merchandise bought by and delivered to him.....	470, 478
But does not extend to property not delivered, as in purchase of "futures".....	478, 479
Contract of pledge is established by implication.....	470, 471, 475 to 478
Obligations of — and purchaser.....	471
Criticism of rule that relation between — and customer is one of pledge and not of agency.....	472, 475, 477 to 479
Admissibility of custom to show nature of relation.....	472 to 475
Right of — to repledge stocks held for customer.....	473, 474

CALIFORNIA. (See Bills of Lading.)

CASAREGIS.

	SECTION.
Quotation from	357

CHATTEL MORTGAGE.

Distinction between — and pledge.....	87, 88, 101
Not known to civil law.....	89
In Louisiana — is sometimes effective as pledge.....	111, 112, 123

CHECKS.

When drawn against designated fund create an equitable lien on the fund.....	549
---	-----

CHOSE IN ACTION. (See Incorporeal Rights, Inheritance, Policy of Insurance, Bill of Lading, Warehouse Receipts, Negotiable Paper.)

CIVIL LAW.

Origin and definition of <i>pignus, fiducia, hypotheca</i>	544 to 546, 552
For detailed distinctions between — and common law—see “Common Law”	

COMMERCIAL PLEDGES. (See Negotiable Paper, Bill of Lading, Policy of Insurance, Warehouse Receipts, Law Merchant.)

Law of — in France, Germany and the Netherlands.....	325 to 330
--	------------

COMMON CARRIER.

Has lien on goods for freight earned in carriage	519, 538
--	----------

COMMON LAW, THE.

Mortgage and pledge not clearly distinguished in	39 et seq.
--	------------

DISTINCTION BETWEEN—AND CIVIL LAW.

In pledge of incorporeal rights	11, 12, 18, 153, 154
Necessity of notice in seizure of incorporeal rights, 14, 153, 533	
Pledge of inheritance.....	46 to 55
Possession of incorporeal rights	163
Prescription of debts	187 to 193, 195 to 198
Prescription of ownership of pledge	176 to 186
Contract of pledge, suretyship and mortgage.....	188 et seq.
Arises from difference in controlling principle.....	193
Possession of personal property other than bills, notes, etc.	200, 201
Use of thing pledged	202 et seq.
Pledge of another person's property.....	231 et seq.
Right of pledgeor's creditors, other than pledgee, to seize pledge.....	255 to 259
Where pledgee has been deceived in thing pledged	275 to 277
Revocation by death of mandate to sell pledge	281 to 289
Rights of pledgee of bill of lading against true owner, where another is pledgeor	339 et seq.
Stipulations of bill of lading, application of <i>lex loci con-</i> <i>tractus</i> or <i>solutionis</i>	364 to 385
Seizure of pledge by ordinary creditor	255 to 260
Rights of factors, agents and pledgees of personal prop- erty	480, 481, 498 et seq.
Rights conferred by possession of personal property. 504 et seq.	

COMMON LAW—CONTINUED.

	SECTION.
Lien at common law and tacit pledge under civil law.....	518 to 537
Lessor's right of pledge.....	523 to 542
See Personal property, Pledge, Pledgee, Pledgeor, Policies of Insurance, Possession, Power of Attorney, Prescription, Privileges, Redemption, Sale, Seizure, Tacit Pledge, Use.	

CONFLICT OF LAW.

Arising from different rules governing stipulations of bill of lading.....	361, 362
Bill of lading is receipt for goods and contract of affreightment.....	364
Performance of contract is at place of delivery of goods.....	364, 369 et seq.
Doctrine that <i>lex loci contractus</i> controls, unless contrary intention is manifested.....	366, 368, 376, 377
Criticism of the doctrine.....	378, 385
Consequences flowing from rule that <i>lex loci contractus</i> or <i>solutionis</i> governs.....	364, 365
The law applicable to the bill of lading controls its pledge.....	369, 381 to 385

CONSTRUCTIVE DELIVERY. (See Delivery.)

CONTRACT. (See Obligations for special class of—as Sale, Bill of Lading, Policy of Insurance, etc.)

CROPS, GROWING.

Can not be pledged.....	26
<i>Aliter</i> in Louisiana under statute.....	27, 42

CORPORATE STOCKS. (See Stocks.)

CREDITOR, ORDINARY. (See Pledgee.)

Right of attaching—in pledged inheritance inferior to that of pledgee.....	51
Under civil law — may seize pledge, subject to pledgee's rights.....	255, 258
<i>Aliter</i> at common law.....	259
But seizure must not impair value of pledge.....	257
A showing that value of pledge exceeds pledgee's claim is condition precedent to seizure and sale.....	260

DEATH OF PLEDGEOR.

At common law — revokes mandate to sell pledge unless agent has title.....	281 to 284
Modification of doctrine.....	285
Under civil law — does not revoke mandate.....	286 to 289

DEBT.

Meaning of term in civil law.....	68, 69
-----------------------------------	--------

DEBTOR.

At civil law — of "A" must have notice of seizure by creditor of "A".....	14 et seq., 533
<i>Aliter</i> at common law.....	18 et seq., 533

DELIVERY. (See Possession.)

SECTION

Actual or constructive --- of thing pledged essential	8, 122, 123
Of incorporeal rights is effected by transfer of title under Code	
Napoleon and Code of Louisiana	11, 12, 18
At civil law, notice to creditor of --- necessary to affect third persons	11, 14, 153, 533
<i>Aliter</i> at common law	18, 153
Impossibility of --- prevents pledge of property to be acquired <i>in futuro</i>	25 et seq., 41
Constructive --- of an inheritance	50, 55
To pledgeor as agent of pledgee, must be for his account, for special purpose and limited in time	128 to 135
May be to third person, who accepts trust and for benefit of pledgee	127, 139
Not necessary where pledgee is in possession	143
May be symbolical	144
Of bill of lading in Louisiana, made by mailing	145
Of warehouse receipts or keys	146 to 148
Criticism of constructive ---	149, 150
Constructive --- of things too bulky for actual ---	151, 152
Difference between --- in sale and pledge	168

DEPOSITARY.

Has lien on property deposited, for expense incurred in pre-serving it	529
--	-----

DILIGENCE.

Degree of --- required of pledgee in caring for pledge	266, 267
--	----------

ENGLAND. (See Bill Lading, Policies of Insurance.)

Owner can not recover pledge, even if pledgee had notice that pledgeor was agent	482
Pledge only invalid where pledgee had notice that pledgor was without authority to pledge	483
<i>Quære</i> —Is there a distinction between factor and agent?	481 to 483

EQUITABLE LIEN. (See Tacit Pledge, Privilege, Lien.)

Analogy between --- and privilege	521, 543 et seq., 552
Distinctions between --- and privilege	552 et seq.
Derived from the civil law	544, 551
Follows property into hands of transferees who have notice	547
Is conferred by intention, express or implied	547, 550
Possession of property subject to --- remains with debtor	547
How created and on what it bears	547, 548
Check drawn on designated fund, gives --- on such fund	549
Real as well personal property may be subject to ---	549
Instance of what will create --- by implication	550
Nature and theory of ---	551 et seq.
Louisiana jurisprudence and laws connected with the subject	556 to 567
Effect given --- by Federal Courts, conflict with statutory law of States	561 to 565
(Reference in note to "89 La. An." should be "39 La. An.")	

EQUITY JURISDICTION.

Of courts of Louisiana 564 to 567

ESTOPPEL.

Pledgeor can not deny ownership of property pledged by him
43 et seq.

EXPENSE.

Pledgeor bound for — *necessary* in caring for pledge 270 to 274
But only for value added to pledge by *useful* — 270 to 274

FACTOR, PLEDGE BY. (See Warehouse Receipts, Power of Attorney, Bill of Lading)

At common law — can not pledge property of principal 480
Mandate of — is only to sell 480
Is mere agent with limited and specified authority 481
Relation was broadened by statute 481
In England so that principal is bound even if pledgee had notice of capacity 482
 Aliter, if pledgee had notice that factor was without authority 483
In New York the statute protects the pledgee when he was without knowledge that the pledgeor was not owner 484 to 486
In Massachusetts the rule is like in England 487, 488
In Louisiana the common law rule obtains 489 et seq.
 Though statutes seem to have changed it 493 et seq.
Under the civil law the pledgee in good faith for value and without notice holds against owner 498 et seq.
 And this though agent is without power to pledge property of principal 500
 The rule extends to pledge made by any bailee or depositary (but see 506) 501, 502, 505
 In France the rule is perhaps restricted to pledges by — (but see 501, 502) 505, 506
Definition of — in Code of Commerce of France 505
Distinction between — and agent 505
Has lien on goods of principal for advances 519, 538

FEDERAL COURTS. (See Bills of Lading, Substitution of Pledge, Stocks, Policies of Insurance.)

Jurisprudence of — in Louisiana concerning Equitable Liens 561 to 565

FIDUCIA.

Origin and definition of 544 to 546

FRANCE. (See Commercial Law, Pledge No. 1, 3, Policies of Insurance, Prescription, Tacit Pledge, Tortious Pledge, Warehouse Receipts.)

Pledge of incorporeal rights in — 11 to 24
Lease of real estate may be pledged in —, how effected 56 to 59
Commercial law of pledge in — 325 et seq.

FRANCE—CONTINUED.

	SECTION.
Bill of lading in — is negotiable, and <i>bona fide</i> pledgee or vendee has perfect title.....	360
When made to designated individual is not negotiable and transferee can not hold against owner.....	337, 338
“ <i>Rentes sur l'Etat</i> ” can not be seized but may be pledged....	4
Definition of Factor in Code of Commerce of —.....	505
Validity of sale or pledge of personal property in — by agents.....	498 to 506
Lessor's right of pledge in —.....	524 to 529

FRUITS OF PLEDGE. (See Use.)

Pledgee may receive	210, 212
Must account for — to pledgeor.....	211 et seq.

GIVE, TO.

Meaning of term in civil law	69, 70
------------------------------------	--------

GERMANY.

Commercial law of pledge in.....	330
----------------------------------	-----

HEIR. (See Inheritance.)

HOLLAND.

Commercial law of pledge in —.....	330
Bill of lading in — is negotiable, and <i>bona fide</i> vendee or pledgee has perfect title.....	360

HYPOTHECA.

Origin and meaning of.....	544 to 546, 552
----------------------------	-----------------

INCORPOREAL RIGHTS. (See Inheritance, Lease of Real Estate.)

Could not at one time be pledged.....	10
<i>Aliter</i> under modern common and civil law	11
Are transferred under Louisiana and Napoleon Codes by pledge ..	11
Effect thereof as to third persons.....	11
Mode of transferring — under Louisiana Code.....	12
Distinction between transfer of — for pledge and for ownership	13
Under Louisiana Code, debtor must have notice of transfer of —.....	14, 533
This notice is also necessary in France.....	15, 16
But notice necessary only to affect third persons.....	17
Notice of transfer of — not necessary under common law	18 to 20, 335
Only movable — can be pledged under Louisiana and Napoleon Codes.....	21, 22
What are movable and immovable —.....	21 to 24

INDIVISIBILITY OF PLEDGE.

The pledge secures every portion of the debt	290 to 293
--	------------

INHERITANCE. (See Incorporeal Rights.)

	SECTION.
Under civil law an — can not be pledged before death of ancestor.....	46
<i>Aliter</i> after death, where estate is composed of movable property.....	46, 52 to 54
At common law, pledge of — is valid both before and after death of ancestor.....	48 to 51, 55
Constructive delivery of an——.....	50, 55

INNKEEPER.

Has lien on effects of traveler for board or lodging.....519, 530, 538

INSOLVENCY OF PLEDGEOR. (See Syndic.)

The — does not impair rights of pledgee.....260 et seq.
And does not revoke his mandate to sell pledge.....278 to 280

INSURANCE. (See Policies of Insurance.)

ITALY.

Bill of lading — is negotiable, and *bona fide* pledgee or vendee has perfect title.....360

KEYS OF WAREHOUSE.

Delivery of — constitutes delivery of property contained therein.....146 to 148

LAW MERCHANT. (See Negotiable Paper.)

Controls commercial pledges.....271

LEASE OF REAL ESTATE. (See Lessor's Right of Pledge, Rent.)

May be pledged.....56
Pledge of — how effected in Louisiana.....56
How in France.....57 to 59

LESSEE.

Rights of — under pledge the law gives lessor.....524 et seq.

LESSOR.

Civil law gives — right of retaining possession.....519, 523 et seq.
Analogous to right of distress at common law.....519, 525 539
Difference between Codes Louisiana and Napoleon on — right of pledge.....524 et seq.
Criticism of Louisiana jurisprudence on subject.....528
Pledge is tacit, because ancillary to contract of lease.....529
At common law—may take lessee's property on premises, without intervention of law.....539
 Aliter at civil law.....540, 541
Exemptions from — lien, etc., in Louisiana.....542

LIEN. (See Equitable Lien. Privilege. Tacit Pledge.)

	SECTION.
Holder of— is without right in or to the property	518, 534
Analogies between common law — and tacit pledge at civil law	519, 538
Differences between them	535, 536
Workman has — on article made or repaired by him, for price of labor	519, 538
Innkeeper has — on effects of traveler for board or lodging	519, 530, 538
Lessor has — on property of lessee for rent of premises	519, 524, 539 et seq.
Factor has — on goods of principal, for advances	519, 538
The common carrier has — on goods, for freight earned in carriage	519, 538
The depositary has — for expense incurred for preservation of property	529
The attorney has — for his fee, on property recovered for client	528
To be effective, property must be in possession of creditor	534
At civil law, the — arises from nature of creditor's claim	534
It can not be created by contract and is <i>stricti juris</i>	536
<i>Aliter</i> at Common law	537

LOUISIANA. (See Bill of Lading, Lessor, Chattel Mortgage, Pledge No. 3, Pledge, Policies of Insurance, Possession, Prescription, Privilege, Seizure, Sale, Stocks, Tacit Pledge, Vessels, Warehouse Receipts.)

Pledge of incorporeal rights in	11, 24
Seizure of debts due debtor, how effected, notice required	11 et seq., 533
Growing crops may be pledged in	27, 42
Lease of real estate may be pledged in	56
Deed executed in common law form, valid as conventional mortgage in	112
Delivery of bill lading in — made by mailing	145
Consignee's privilege <i>primes vendor's</i>	145
Pledgee can not in — acquire pledge by prescription, but debt kept alive by possession of pledge	173
Bill lading made to designated individual is not negotiable in — and transferee can not hold against owner	337, 338
Pledgee can not sell pledge in — unless authorized by contract	307 et seq.
But by contract may sell at private sale or auction	307 et seq.
Pledge in — must be by written act, except for promissory notes, etc.	316
Factors can not pledge property of principal in	489 et seq.
Though governed by civil law, follows common law in commercial affairs	490
Liens in — arise from nature of creditor's claim, can not be established by contract	534 to 536
Lessor's right of pledge in	524 et seq., 540, 541
Exemptions from lessor's lien, etc., in	542
Jurisprudence and laws of — relative to equitable liens	556 to 567
Reference on p. 513 to "89 La. An." should be to "39 La. An."	
Equity jurisdiction of courts of — its laws and jurisprudence	564, 565 et seq.
Effect given Equitable Lien in — by Federal Courts, conflicts with Statute	561 to 565

LIMITATION, STATUTE OF. (See Prescription.)

SECTION.

At common law — bars right of action for debt secured by pledge, but does not bar right of pledgeor to pledge ..	7
<i>Aliter</i> under civil law	173

MARGINS. (See Broker.)

MARYLAND. (See Bills of Lading, Warehouse Receipts.)

MASSACHUSETTS. (See Warehouse Receipts.)

Right of agent in—to pledge personal property.....	487, 488
--	----------

MISSISSIPPI. (See Substitution of Pledge.)

MISSOURI. (See Bills of Lading.)

MONEY.

May be given in pledge	9
------------------------------	---

MORTGAGE. (See Pledge, Chattel Mortgage.)

Distinction between — and pledge	27 et seq. 167
Acquisitions <i>in futuro</i> may be subjected to—but can not be pledged	28, 29
Pledge and — not clearly distinguished in Roman law.....	31
Nor in the Common law.....	39 et seq.
<i>Aliter</i> by the French civilians	32, 33, 34
Errors of Judge Story on subject	28, 35 to 38
Executed in common law form, effect of in Louisiana	112
Pledgee must reinscribe — in proper time	270
Equity of redemption can not be waived by mortgagor.....	304

MOVABLES. (See Personal Property.)

NEGOTIABLE PAPER. (See Bills of Lading, Warehouse Receipts.)

Right of pledgee of — to repledge	205, 207, 215, 230
Pledgee of — must preserve rights against endorser by protest	270
Pledge of — controlled by law merchant.....	314 to 316, 321
And act in writing not necessary.....	317
Right of pledgee to sell — must be stipulated	317
May validly be pledged before maturity by others than owner	318 to 320, 323 to 325
<i>Aliter</i> after maturity	322 et seq.
Even after maturity pledge valid in some States	321
A pre-existing debt is a valid consideration for the pledge of — in some States; <i>Aliter</i> in others	321

NEW YORK. (See Policies of Insurance, Warehouse Receipts.)

Pledgee in — without notice of pledgeor's want of authority holds pledge against owner	484 to 486
<i>Aliter</i> where consideration for pledge was a pre-existing debt of pledgeor.....	321

OBLIGATIONS.

All valid — may be secured by pledge	65, 67, 71
Of third persons, may be secured by delivery of pledgeor's property	72
Effect of such pledges	73 to 75

OBLIGATIONS—CONTINUED.

	SECTION.
Nullity of — releases pledge.....	76, 77
<i>Aliter</i> where nullity of — arises from incapacity personal to debtor.....	76, 77
The law will not aid recovery of pledge given for illegal or immoral purpose	77 to 89
<i>Aliter</i> where the contract is not executed	82, 83

OWNERSHIP.

Pledgeor retains — of property pledged	108
Pledgee, even by stipulation, can not acquire — of pledge in payment of claim.....	299 to 302
Such stipulation valid after maturity of debt	303 to 305

PATENT OF INVENTION.

May be pledged	69
Pledgee of—without right to work invention.....	63
Notice of pledge of—not necessary.....	154

PAYMENT.

Meaning of in civil law.....	68, 69
Of obligation, extinguishes pledge.....	194

PERSONAL PROPERTY. (See Factor. Incorporeal Rights. Inheritance).

Possession of—is equivalent to title	504
Distinction between common and civil law in this respect	507
Reason for common law rule	508 et seq.
At common law, possession of—confers only <i>prima facie</i> title	509 et seq.
And vendee or pledgee of—acquire only the title of vendor or pledgeor	510 et seq.
Criticism of common law rule.....	511 to 516
Superiority of civil law rule.....	517

PIGNORATIVE CONTRACT.

Nature of	116 et seq.
Distinguished from sale with right of redemption	117 et seq.
Gives creditor no lien or privilege against third persons	121, 158, 159

PIGNUS.

Origin and definition of.....	544 to 546
-------------------------------	------------

PLEDGE. (See Pledgeor, Pledgee, Tortious Pledge, Creditor.)

I. OBJECTS OF PLEDGE.

What may be pledged	1, 3, 4, 9, 11
What may not be pledged.....	8, 21, 22, 25, 26, 28, 56, 63, 64
Incorporeal rights could formerly not be	9
<i>Aliter</i> under modern common and civil law	11
Immovable incorporeal right can not be	21, 22
Nor incorporeal rights not evidenced by muniment of title.....	12, 153 et seq., 166, 167

PLEDGE—(CONTINUED).

SECTION.

But may be pledged by written act of—; the act constituting delivery of the credit.....	169 et seq.
Nor property to be acquired <i>in futuro</i>	25 et seq.
<i>Aliter</i> under statutes.....	25, 42
Property of others than pledgeors may be pledged by delivery.....	43, 72
Effect thereof against owner.....	44, 45, 73 to 75
The—may by contract be made to cover the debt incurred subsequently.....	294 to 296
<i>Aliter</i> in France and other countries of Europe.....	297, 298
(See Inheritance, Patent, Lease, Rent, Policies of Insurance, Warehouse Receipts, Negotiable Paper, Bills of Lading.)	

2. PURPOSE AND FORM OF PLEDGE.

Object and purpose of.....	2, 5
Definition of.....	66, 68
Chattel mortgage and—distinguished.....	87, 88, 101
Form and essentials of.....	8, 84
At civil law, act of—must be in writing, except commercial pledges.....	89, 91, 317
Right of sale by pledgee must be stipulated.....	317
Written act not necessary at common law.....	98
Pledge of negotiable paper controlled by law merchant.....	314 to 316
Property pledged must be described in act of.....	92, 93
But act need not be in any certain form.....	94
And written act necessary only against third persons.....	95 to 97
Validity of—when in form of sale.....	98 et seq., 116 et seq.
Objections to—in form of sale.....	101, 102, 110, 116 et seq.
(See Mortgage, Lien, Equitable Lien.)	

3. THE CONTRACT, ITS REQUIREMENTS AND EFFECT.

The contract of.....	5, 6
Possession of—by pledgee is precarious.....	7
But duration of possession not limited.....	6
Pledgee can not acquire ownership of.....	7
Under Codes Napoleon and Louisiana—of incorporeal rights is transfer of rights.....	11
Effect of such transfer.....	12
Transfer for pledge is not equivalent to ownership.....	13, 113
Debtor of incorporeal right must have notice of transfer.....	14, 153 et seq.
Effect of such notice.....	15 to 17, 153 et seq.
Notice not necessary under common law.....	18 to 20
Nor at civil law of incorporeal things which are not credits.....	154
Any legal obligation may be secured by.....	65, 67
The obligation of one may be secured by—of another's property.....	72
Effect of such a transaction.....	73, 75
Nullity of obligation, invalidates.....	75, 76
<i>Aliter</i> where nullity is caused by incapacity personal to debtor.....	75, 76

PLEDGE—CONTINUED.

	SECTION.
The law will not aid recovery of—given for immoral or illegal purpose.....	77, 80
<i>Aliter</i> where the immoral contract is not yet executed.....	82, 83
(See Prescription, Possession, Delivery, Pignorative Contract, Sale.)	

4. MISCELLANEOUS.

The—of usufruct of a thing, is not—of thing itself.....	24
Fruits of things pledged become part of.....	25
An agreement to—may be enforced.....	41
The—is indivisible, and secures every part of the obligation.....	290 to 293

PLEDGE. (See Prescription, Pledgeor, Pledge, Creditor, Possession.)

Rights of—in pledged inheritance, against subsequent creditor.....	51
Rights of—in pledged patents.....	63
In works of the Mind.....	64
At civil law—is without title in thing pledged.....	113
And can not use things pledged—is mere depositary.....	199 et seq.
Exception to rule.....	209, 213
Has right only to <i>proceeds</i> of pledge.....	200, 255 to 258
<i>Aliter</i> at common law, where right is in the thing.....	200, 259
At common law—may use thing pledged.....	202, 210, 213, 224 et seq.
But use must not injure thing, and is at peril of.....	225, 226
Criticism of common law doctrine.....	227
The—may receive fruits of thing pledged.....	210 to 112
But must account for them.....	211 et seq.
May receive and enforce payment of claims pledged with him.....	207, 212, 213, 266 to 270
Right of—to subpledge questioned.....	205, 207, 215 to 217
Limitation of right by Judge Story.....	228
But right now fully established.....	214 et seq., 229, 230
The—may transfer his claim, with pledge.....	222
The—not bound to surrender pledge to assignee or syndic of pledgeor.....	260 to 263
Difficulties and limitation of the rule.....	264, 265
Degree of diligence required of—in preservation of pledge.....	266, 267
Liability if pledge is stolen.....	268, 269
For neglect to enforce right arising under pledge.....	270
Special skill not required in care or administration of pledge unless specially agreed.....	270
The—may recover <i>necessary</i> expense incurred in caring for pledge.....	270 to 274
If expense only <i>useful</i> , then only for value added to pledge.....	270 to 274
At civil law—may demand another pledge, when deceived in thing pledged.....	275, 276
Or may rescind contract and demand immediate payment.....	276
<i>Aliter</i> at common law, where he has only action in damages.....	277
Even by contract—can not appropriate pledge in payment of debt.....	299 to 302
May do so by contract after maturity of claim.....	303 to 305
Under civil law—can not sell pledge without judgment.....	306
<i>Aliter</i> if pledge consists of commercial paper, when sale may be stipulated.....	306, 317
In Louisiana, sale may be stipulated.....	307 to 309, 317

PLEDGE—CONTINUED.

	SECTION.
At common law—may sell at public auction after notice	310
And may stipulate for private sale	310
The—may be purchaser at sale of pledge	311
Even when under the contract he is vendor	312, 313

PLEDGEOR.

May pledge his property to secure obligation of another	72
Rights of — when pledged property pays debt	73 to 76
The — is released by nullity of obligation of debtor	75, 76
Aliter where nullity is caused by incapacity personal to debtor	75, 76
The law will not aid the — to recover property pledged for illegal or immoral purpose	77 to 80
Aliter when the contract is not yet executed	82, 83
The — retains ownership of thing pledged	108, 113
At civil law — may perhaps revendicate pledge acquired by pledgee by prescription	176 to 182
May rescind contract of pledge for misuse of pledge	240 to 254
Assignee or syndie of — occupies same position as	260 to 263
Difficulties and limitations of rule	264, 265

POLICIES OF INSURANCE.

Pledgee must renew when requested	270
Premiums on — paid by pledgee for part of secured debt	274
Life, fire or marine — may be pledged	444
At common law, simple delivery of — suffices	444
But where payee is designated, his endorsement is necessary	445
In England it is more common to mortgage than to pledge	446
Steps necessary to effect pledge of — at civil law and in Louisiana	447
Policy void if pledged or transferred without consent of insurer	450, 455
But insurer alone can demand nullity of — but not of pledge	452
Assignment or pledge of — on life to one not having insurable interest	453 et seq.
Defeasible if issued to one without interest	453
Therefore defeasible if pledged or assigned in that way	453, 454
The question not settled in France	455, 464
In Belgium the issue is prohibited	456
Rule in Supreme Court of United States	457, 465
In England if — was valid when issued, it may be transferred to any one	461 to 463
Rule in New York and other States is like that of England	458, 459, 463
A — on life is an agreement to pay a certain sum of money	458, 460 to 463
Under rule of United States Supreme Court creditor can hold — only for amount of debt	465, 466
When debt is paid — being only security must be re-assigned	467
In France — obtained by creditor remains his, if debtor was not charged with premiums—Creditor may in addition recover debt	468, 469

POSSESSION. (See Delivery.)

	SECTION.
Of thing pledged is essential	8, 84 et seq., 122, 125, 126
May be actual or constructive	8
Of inheritance in expectancy, how acquired	50
Examples of — by pledgee's agent	123 et seq.
Control of pledge, not equivalent to	126
May be by agreed depositary, who accepts trust	127
But — must be for benefit of pledgee	127
By pledgeor, must be for account pledgee and for special purpose	128 to 135
May begin before or after creation of debt secured by pledge	136, 142, 143
In Mississippi — is destroyed, if pledged property is substituted	137
<i>Aliter</i> — in Federal Courts and in other States	137 et seq.
Distinction between common and civil law in — of pledge by the pledgee	162 et seq.
Of incorporeal rights must be apparent	164 et seq.
Difference in — for purpose of sale and pledge	167
What is sufficient — at common law for incorporeal rights	169 et seq.
Of pledgee is not as owner	173
Under Codes Napoleon and Louisiana prescriptive title acquired by — after payment of obligation	173 to 175
But pledgeor may perhaps revendicate	176 to 182
At common law — does not confer title	184 to 186, 196, 197
Except where — continued for "long lapse of time"	184 to 186
At civil law — prevents prescription of debt	183 et seq., 195
<i>Aliter</i> at common law	189 to 192, 196, 198

POWER OF ATTORNEY.

To sell pledge, is not revoked by bankruptcy of pledgeor	278, 279
Nor by his death, at civil law	286 to 289
<i>Aliter</i> at common law, unless title to pledge was in agent	281 to 284
Modification of doctrine	285

PRESCRIPTION. (See Limitation, Statute of.)

Does not affect pledge	7, 173, 183
At civil law the debt secured by pledge is not affected by	7, 173, 183, 197
<i>Aliter</i> at common law	187 to 193, 198
In France and Louisiana pledgee acquires title by — if he retains possession of pledge after payment of obligation	173 to 175
But it seems that the action of revendication is still left the pledgeor	176 to 182
At common law pledge can not be acquired by	184 to 186
But if "after a long lapse of time" without a claim of redemption, the right is extinguished	184 to 186

PRIVILEGES—CIVIL LAW. (See Liens, Equitable Liens, Tacit Pledge.)

Distinction between — and pledge	520, 521
Are analogous to equitable lien at common law	521, 543 et seq., 552
In Louisiana — are fixed by statute	529 et seq.
Are creatures of law, can not be created by contract, and are <i>stricti juris</i>	536, 552 to 555

RECEIPTS. (See Warehouse Receipts.)

RECEIVER. (See Syndic.)

REDEMPTION. (See Sale.)

- Right of — at civil law in contract of sale..... 114, 115
- Distinguished from equity of — in common law mortgage..... 115
- Waiver of equity of — in mortgage is void..... 303
- Pledgeor may redeem pledge, though he stipulated that pledgee
 should retain it in payment of claim 299 to 302
- But can not do so if stipulation made after maturity of obli-
 gation 303 to 305

RENT. (See Lease.)

- May be pledged at common law 60
- Aliter* at civil law..... 61, 62

RESCISSION OF CONTRACT OF PLEDGE. (See Resolatory Condition.)

- Pledgee may demand — for misuse of pledge 240 et seq.

REPLEDGE. (See Subpledge.)

RESOLUTORY CONDITION. (See Rescission.)

- The — is implied in contract of pledge 240 et seq.

SALE. (See Pignorative Contract.)

- Pledge in form of 98 et seq., 116 et seq.
- Effect of — with right of redemption 114, 115, 119, 120
- Effect of simulated — as security..... 119 to 121, 159
- Every species of incorporeal right may be subject of 158 et seq.
- But possession must be apparent and notorious..... 158 et seq.
- The — of a credit, without muniment of title, as a disguised
 pledge, is without effect against third persons (but see 169)
 158 et seq.
- Under civil law — of pledge must be preceded by judgment 306
- Aliter* under statutes in pledge of commercial paper..... 306
- In Louisiana parties may agree to — of pledge..... 307 et seq.
- At common law pledgee may sell at public auction after reason-
 able notice to pledgeor..... 310
- And parties may stipulate for private — 310
- And pledgee may buy at private or public — 311 to 313
- Even when, under the contract, he is vendor, if it be so
 stipulated 311 to 313

SEIZURE—JUDICIAL.

- Creditor by — has tacit pledge or lien..... 531, 533
- In Louisiana debtor must have notice of — of credits..... 533
- Aliter* at common law..... 19 et seq., 533

STATUTORY PLEDGE. (See Lien, Tacit Pledge.)

- Criticism of term 522, 523

STOCKS. (See Broker.)

	SECTION.
Development of right to pledge shares of	409 to 411
Transfer of — on books of corporation necessary for valid	
pledge (but see 414)	412 et seq.
Pledge without such transfer not good against creditor of	
pledgeor	415
<i>Aliter</i> in Louisiana	419, 427 to 431
Provision in charter of corp. that sale is not valid with-	
out transfer does not affect pledge	431
<i>Aliter</i> in other States, at least for debts due corp. by	
transferor before pledge	432
Pledgee of — transferred succeeds to liability of pledgeor	415, 416
And real pledgee is liable, though transfer is to interposed	
irresponsible party	415
But the liability doubtful, where pledgeor received the	
dividends	417
Under National Bank act, transferee though not owner is liable	
as shareholder	418
Qualification of doctrine, and rules of Supreme Court of	
United States	424 to 426
Statutory exception to rule, that transferee holding as pledgee	
is liable	420
And parties to pledge, by endorsement on certificate or	
books of corp. may relieve pledgee from liability	421
Liability of pledgee of — pledged by corporation itself	422, 423
Pledgee of — is entitled to dividends	433
But corporation must have notice of pledge	434
If corporation without notice pays to pledgeor pledgee may	
recover from him	434, 435
Pledgee may sell — without notice and at private sale, if it is so	
stipulated	436
And may substitute other shares for those pledged	437, 438
Criticism of right to substitute	439, 442
But where stipulated, right to substitute approved by some	
civilians	443

STOLEN PROPERTY.

Pledgee of lost or — can not hold against owner	503
---	-----

SUBPLEDGE.

Right of pledgee to — questioned	205, 207, 215 to 217
Denied at civil law	217 et seq.
Generally admitted at common law	224, 229, 230
Limitation of doctrine by Judge Story	228
Rights of subpledgee	216, 217
Pledgee of negotiable paper, acquired from another than owner.	
may validly —	324
Broker may — stocks held for customer	473, 474

SUBSTITUTION OF PLEDGE. (See Stocks.)

In Mississippi, the — by other things destroys pledge	137
<i>Aliter</i> in Federal Courts	137 et seq.

TACIT PLEDGE. (See Liens, Privilege, Equitable Lien.)

	SECTION.
Criticism of term	520
True meaning of	523 et seq.
Is contracted under law, permitting creditor to retain possession	523 et seq.
As between lessor and lessee.....	519, 524 et seq., 538
As between innkeeper and guest	519, 530, 538
Of workman on property repaired	519, 538
Of carrier for freight earned	519, 538
As between factor and principal	519, 538
Of attorneys on property recovered for clients	538
Distinction between Codes Napoleon and Louisiana on subject	524 et seq.
Criticism of jurisprudence of Louisiana on subject.....	528
Results in favor of creditor by judicial seizure of debtor's property	531, 533
But seizure must be accompanied by taking possession	532
Is effective only when property is in possession of pledgee	534
Analogy and difference between — and lien at common law	519, 535, 536

TORTIOUS PLEDGE.

Pledge of another's personal property, other than negotiable paper, is invalid	231, 233, 234, 238, 239
<i>Aliter</i> in France, Belgium, Holland and Italy	232, 234 to 239

USE. (See Fruits of Pledge.)

At civil law pledgee has not — of pledge	199 et seq.
<i>Aliter</i> under common law	202, 210, 213
Exception to civil law rule	209, 213
Right to subpledge	205, 207, 214

USUFRUCT.

Of real estate can not be pledged	22
Pledge of — of thing is not pledge of thing	24

VESSELS.

Pledge of — valid when in form of sale	101, 102
Chattel mortgage on — effective as pledge in Louisiana	123

WAREHOUSE RECEIPTS. (See Bills of Lading, Negotiable Paper, Incorporeal Rights.)

Like a bill of lading, it is not a symbol of, but a muniment, of, title to goods.....	386
Is <i>quasi</i> negotiable. Holder for value of — has indefeasible title against maker.....	387
Pledgee of — has only pledgeor's title, true owner can recover	388, 389
Rule in Louisiana and Maryland	390 et seq.
Criticism of decisions interpreting statutes of Louisiana	392, 401

WAREHOUSE RECEIPTS—CONTINUED.

SECTION.

In some countries of Europe, Maryland and Massachusetts pledgee of — holds against owner.....	352, 399, 400, 482, 487, 498 et seq.
Conflicting decisions of New York courts of "Factor's Act"	402 to 404
As with bill of lading, if owner has given <i>indicia</i> of ownership to agent, he may validly pledge.....	406, 407
Law of France concerning —.....	408

WISCONSIN. (See Bills of Lading.)

WORDS AND PHRASES.

Debt, meaning of, at civil law.....	69
Factor, definition of in Code of France.....	505
<i>Fiducia</i> , origin and meaning of.....	544 to 546
<i>Hypotheca</i> , origin and meaning of.....	544 to 546
Ownership, definition of.....	333
Payment, meaning of at civil law.....	68, 69
<i>Pignus</i> , origin and meaning of.....	544 to 546
Pledge, definition of.....	66, 68
Statutory pledge, criticism of term.....	522, 523
Tacit pledge, criticism of term.....	520, 523
To Give, meaning of term at civil law.....	69, 70

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